

The USA PATRIOT Act of 2001, the Intelligence Reform and Terrorism Prevention Act of 2004, and the False Dichotomy Between Protecting National Security and Preserving Grand Jury Secrecy

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On September 11, 2001, thousands of lives were lost, buildings were demolished, and our nation's democratic institutions were shaken to their core. One such institution, the federal grand jury, continues to feel the reverberations from that day. The doctrine of grand jury secrecy, enshrined under the common law and subsequently codified in Federal Rule of Criminal Procedure 6(e) ("Rule 6(e)"), faces perhaps the most serious threat in its history.

In response to the continuing danger posed by terrorism, Congress has amended Federal Rule of Criminal Procedure 6(e) to create unprecedented exceptions to the rule that matters before a federal grand jury must not be disclosed.¹ As part of a much larger plan to encourage the sharing of information by law enforcement and intelligence officials,² a new exception to Rule 6(e) created by the USA PATRIOT Act of 2001³ ("Patriot Act") facilitates the sharing of grand jury materials relating to intelligence matters with federal intelligence, immigration, defense, protective, and security officials.⁴ To further address the threat, the Intelligence Reform and Terrorism Prevention Act of 2004⁵ added a second exception to Rule 6(e):

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¹ See *infra* Part I.C.

² See *infra* notes 114–35 and accompanying text.

³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at FED. R. CRIM. P. 6 and in scattered sections of 18, 22, 28 and 50 U.S.C.A.) [hereinafter Patriot Act].

⁴ Patriot Act § 203(a), 115 Stat. at 278–80 (codified as amended at FED. R. CRIM. P. 6(e)(3)); see *infra* notes 94–188 and accompanying text.

⁵ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-

Grand jury materials relating to threats to national security (such as terrorism and sabotage) may be disclosed to a wide-ranging group of officials, including foreign officials.⁶ Neither of the new exceptions, however, requires judicial approval of disclosures or a showing of particularized need. Constitutional challenges are almost certain.⁷

Notably, unlike many other provisions of the Patriot Act and some other provisions of the Intelligence Reform and Terrorism Prevention Act, these provisions do not contain a sunset rule.⁸ In other words, these are not wartime security measures; rather, the changes are permanent. Accordingly, Congress is obligated to revisit these hastily crafted policy decisions made against the backdrop of a national security crisis.

Part I of this Article describes the history of grand jury secrecy within the United States from its common-law beginnings to the most recent amendments to Rule 6(e). Examining the relationship between the right of grand jury secrecy and the Grand Jury Clause of the Fifth Amendment, Part II concludes that the right of grand jury secrecy enjoys constitutional protection. Part III then determines that the newly created exceptions to Rule 6(e) are, at best, poor public policy and, at worst, violations of the Grand Jury Clause of the Fifth Amendment. Finally, Part IV proposes an amendment to Rule 6(e) that would preserve a right valued for nearly a millennium and bring the new exceptions within constitutional limits without sacrificing national security interests.

I. A BRIEF HISTORY OF GRAND JURY SECRECY IN THE UNITED STATES

The history of grand jury secrecy within the United States can be

458, 118 Stat. 3638 (to be codified at FED. R. CRIM. P. 6 and in scattered sections of U.S.C.).

⁶ *Id.* § 6501(a), 18 Stat. at 3760 (codified at FED. R. CRIM. P. 6(e)); *see infra* notes 188–198 and accompanying text.

⁷ *See* Frederick P. Hitz, *Unleashing the Rogue Elephant: September 11 and Letting the CIA Be the CIA*, 25 HARV. J.L. & PUB. POL'Y 765, 773 (2002).

⁸ The Patriot Act contains a sunset provision that makes the Act ineffective as of December 31, 2005. Patriot Act § 224(a), 115 Stat. at 295 (codified at 18 U.S.C. § 2510 note (Supp. I 2001)). However, the sunset provision specifically exempts section 203(a), which amended Rule 6(e). *Id.* The Intelligence Reform and Terrorism Prevention Act of 2004 contains sunset rules for a few provisions, though not the provisions which amend Rule 6(e). *See, e.g.*, Intelligence Reform and Terrorism Prevention Act § 6603(g), 118 Stat. at 3764 (to be codified at 18 U.S.C. § 2332b). The proposed PATRIOT Oversight Restoration Act, S. 1695, 108th Cong. (2003), would extend the Patriot Act's sunset provision to include section 203(a); *see also* 149 CONG. REC. S12284 (daily ed. Oct. 1, 2003) (statement of Sen. Leahy).

divided into three distinct eras: the common-law era, the pre-September 11th rules era, and the post-September 11th rules era.

A. *The Common-Law Era*

“[O]lder than our Nation itself,”⁹ the right to indictment by a grand jury journeyed to the New World with the English colonists.¹⁰ In the United States, as in England, “the grand jury has convened as a body of laymen, free from technical rules, acting in secret”¹¹ For centuries, the common law protected grand jury secrecy.¹²

To understand the reasons for secrecy, one must understand the role of the grand jury proceeding. Grand jury proceedings have traditionally served two functions: investigating whether there is probable cause that a crime has occurred (i.e., the “sword” or “investigatory” function)¹³ and screening cases to shield innocent persons from unwarranted prosecution (i.e., the “shield” or “screening” function).¹⁴ Thus, grand juries serve both the governmental interest in finding and punishing wrongdoers and the individual interest in avoiding the indiscriminate exercise of governmental authority.¹⁵ Although the grand jury was created to serve the investigatory function,¹⁶ by the seventeenth century, the screening function had risen to prominence.¹⁷ Indeed, the screening

⁹ *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959).

¹⁰ See *Costello v. United States*, 350 U.S. 359, 362 (1956); Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 5–16 (1996). The first regular American grand jury sat in the Massachusetts Bay Colony in 1635. RICHARD D. YOUNGER, *THE PEOPLE’S PANEL: THE GRAND JURY IN THE UNITED STATES, 1631–1941*, at 6 (1963).

¹¹ *Costello*, 350 U.S. at 362. In the early English criminal courts, “if a grand juror disclosed to a person accused the evidence before the grand jury in his case, such grand juror became accessory to the crime, if it was a felony, and a principal, if it was treason” *In re Atwell*, 140 F. 368, 370 (W.D.N.C. 1905), *rev’d*, *Atwell v. United States*, 162 F. 97 (4th Cir. 1908). In American courts, disclosure was punished with contempt proceedings. *Goodman v. United States*, 108 F.2d 516, 519 (9th Cir. 1939).

¹² See, e.g., *Goodman*, 108 F.2d at 520 (holding that despite lack of statute or rule requiring grand jurors or grand jury witnesses to take oath of secrecy, such was within discretionary power of courts). American courts often required grand jurors and witnesses to take an oath of secrecy. *Id.* at 518–19.

¹³ SUSAN W. BRENNER & GREGORY G. LOCKHART, *FEDERAL GRAND JURY PRACTICE* § 3.1 (1996).

¹⁴ *Id.* § 2.2.

¹⁵ *Id.*

¹⁶ YOUNGER, *supra* note 10, at 1.

¹⁷ “[U]nlike its English progenitor, the American grand jury originally began, not

function was viewed by the nation's founders as being of such consequence¹⁸ that it was incorporated into the Fifth Amendment of the United States Constitution.¹⁹

Given the functions the grand jury served, the necessity of conducting its proceedings in private was obvious.²⁰ Long before the discovery of the New World, grand jurors were required to take an oath of secrecy.²¹ Prior to the War of Independence, governmental representatives were barred from jury deliberations.²² In 1681, John Somers, a noted scholar read on both sides of the Atlantic, outlined three reasons why secret proceedings serve the public good.²³ If targets were aware of the grand jury proceedings, they might conspire to "hide their crimes,"²⁴ or they might flee.²⁵ Either of these events would impede the investigatory function. Also, questioning witnesses privately and separately helps uncover the truth,²⁶ a goal vital to both the innocent target²⁷ (i.e., the screening function) and the King²⁸

as an arm of the executive, but as a defense against monarchy. It established a screen between accusations and convictions and initiated prosecutions of corrupt agents of the government." Kadish, *supra* note 10, at 10.

¹⁸ See, e.g., *Wood v. Georgia*, 370 U.S. 375, 390 (1962) ("Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.").

¹⁹ U.S. CONST. amend. V; see *infra* Part II. By the end of the Revolutionary War, "indictment by a grand jury had assumed the position of a cherished right." YOUNGER, *supra* note 10, at 41.

²⁰ For a more detailed explanation of the interests protected by grand jury secrecy see *infra* Part II.C.

²¹ Kadish, *supra* note 10, at 13.

²² *Id.*

²³ JOHN SOMERS, *THE SECURITY OF ENGLISH-MEN'S LIVES, OR THE TRUST, POWER, AND DUTY OF THE GRAND JURYS OF ENGLAND* 44-55 (photo. reprint 1979) (1681).

²⁴ *Id.* at 44.

²⁵ *Id.* at 46.

²⁶ See *id.* at 46-47 ("Yet the reason will be still more manifest for keeping secret the accusations and the Evidence by the Grand Inquest if it be well considered, how useful and necessary it is for discovering truth in the Examinations of Witnesses in many, if not most cases that may come before them; when if by this Privacy Witnesses may be examined in such manner and Order, as prudence and occasion direct; and no one of them be suffered to know who hath been examined before him, nor what questions have been asked him, nor what answers he hath given, it may probably be found out whether a Witness hath been biassed [sic] in his Testimony by Malice or Revenge, or the fear or favour of men in Power, or the love or hopes of Lucre and gain in present or future, or Promises of impunity for some enormous Crime.").

²⁷ *Id.* at 49-52.

(i.e., the investigatory function).

Under the common law, the right of grand jury secrecy was qualified: It could be overcome upon a showing that disclosure was “essential to the enforcement of the constitutional guaranties or to the protection, preservation, or enforcement of public or private rights.”²⁹ The standard applied was stringent. Absent a showing of substantial need, matters occurring before a grand jury were almost never subject to disclosure.³⁰ A majority of the reported cases involved requests for disclosure by defendants seeking to contest an indictment,³¹ but disclosure was also sought by government attorneys desiring to use grand jury materials at trial³² and in other

²⁸ *Id.* at 53–55.

²⁹ *McKinney v. United States*, 199 F. 25, 38 (8th Cir. 1912) (Sanborn, J., dissenting).

³⁰ *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234 (1940) (“[A]fter the grand jury’s functions are ended, disclosure is wholly proper *where the ends of justice require it.*”) (emphasis added); *United States v. Terry* 39 F. 355, 356 (N.D. Cal. 1889) (stating that “general rules or doctrines must in some cases give way; but exceptions to their application must be admitted with extreme caution, and on the clearest ground of their necessity, to secure substantial, and not merely technical, rights”); *United States v. Farrington*, 5 F. 343, 347 (N.D.N.Y. 1881) (“The rule which may be adduced from the authorities, and which seems most consistent with the policy of the law, is that whenever it becomes essential to ascertain what has transpired before a grand jury it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations, because this cannot serve any of the purposes of justice.”) (citations omitted). Departing from the rule of secrecy, the United States Court of Appeals for the Fourth Circuit in *Atwell* held that once the grand jury has issued an indictment and been discharged and the defendant has been taken into custody, grand jurors are no longer bound by an oath of secrecy. *Atwell v. United States*, 162 F. 97, 102–03 (4th Cir. 1908). The idea that the need for secrecy diminishes after the grand jury has completed its work gained some acceptance. *See, e.g., Metzler v. United States*, 64 F.2d 203, 206 (9th Cir. 1933). In the years following the *Metzler* decision, however, the Ninth Circuit’s holding that no requirement of secrecy remains “seems to have made but slight impression upon the federal courts in disposing of many kindred questions.” *United States v. Am. Med. Ass’n*, 26 F. Supp. 429, 430 (D.D.C. 1939).

³¹ *See, e.g., Shushan v. United States*, 117 F.2d 110, 113 (5th Cir. 1941) (upholding trial court’s denial of defendants’ plea to review sufficiency of evidence before grand jury); *United States v. Cent. Supply Ass’n*, 34 F. Supp. 241, 242–46 (N.D. Ohio 1940) (overruling defendants’ motion to release grand jury witnesses from their oath of secrecy to allow defendants to prepare for trial); *Am. Med. Ass’n*, 26 F. Supp. at 429–31 (granting government’s motion to strike defendant’s motion to elicit information from grand jurors relating to possible prosecutorial misconduct); *United States v. Perlman*, 247 F. 158, 161–62 (S.D.N.Y. 1917) (denying defendant’s motion to quash indictment and concluding insufficient reason existed to warrant inspection of grand jury minutes by court or defendant).

³² *See, e.g., Socony-Vacuum Oil Co.*, 310 U.S. at 233 (concluding that “use of grand

proceedings.³³ Disclosure was permitted in only a handful of reported decisions.³⁴

Persons seeking disclosure bore the burden of showing a particularized need for disclosure, such that vague generalities did not suffice.³⁵ For example, grand jury secrecy was “not to be set aside on every request or suggestion of the person indicted, but only when there [was a] probability of serious illegality.”³⁶ Further, the court had the duty to determine if and when some other need outweighed the need for secrecy.³⁷ Not taken lightly, breaching secrecy could

jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge”).

³³ See, e.g., *In re Grand Jury Proceedings*, 4 F. Supp. 283, 283–85 (E.D. Pa. 1933) (permitting grand jury testimony in beer permit revocation proceeding); *United States v. Cobban*, 127 F. 713, 721–22 (D. Mont. 1904) (permitting examination of grand jurors to determine if prosecutorial misconduct tainted grand jury proceeding).

³⁴ See, e.g., *Socony-Vacuum Oil Co.*, 310 U.S. at 231–34 (permitting court-authorized disclosure because “necessary or appropriate” for refreshing recollection of witness at trial); *In re Grand Jury Proceedings*, 4 F. Supp. at 283–85; *Farrington*, 5 F. at 343–48 (recognizing right of court to remove veil of secrecy to investigate prosecutorial misconduct before grand jury).

³⁵ See, e.g., *Shushan*, 117 F.2d at 113 (finding evidence that grand jury was not presented direct testimony on particular element was insufficient to justify reviewing record of proceedings because element may have been established using circumstantial evidence); *Am. Med. Assn.*, 26 F. Supp. at 429–31 (refusing to review grand jury record based on affidavit of defense counsel that “he has been ‘informed’ by various defendants and ‘believes’ that attorneys for the government presented irrelevant testimony to the grand jury, advised it as to the law, and requested and persuaded it to return the indictment”).

³⁶ *Shushan*, 117 F.2d at 113; accord *Pertman*, 247 F. at 161 (noting judge’s right to inspect grand jury minutes “should be sparingly exercised, unless a strong case is made out requiring examination of the minutes in the furtherance of justice, or for the protection of individual rights”).

³⁷ See, e.g., *Schmidt v. United States*, 115 F.2d 394, 397 (6th Cir. 1940) (“Logically, the responsibility for relaxing the rule of secrecy and of supervising any subsequent inquiry should reside in the court, of which the grand jury is a part and under the general instructions of which it conducted its judicial inquiry.”) (internal quotation marks omitted); *Goodman v. United States*, 108 F.2d 516, 521 (9th Cir. 1939) (holding that “the court may at any time in the furtherance of justice remove the seal of privacy from grand jury proceedings”); *United States v. Cent. Supply Ass’n*, 34 F. Supp. 241, 243 (N.D. Ohio 1940) (“We also know that from earliest times the veil of secrecy was cast over the deliberations of the grand jury and they were not called upon to disclose what occurred during their deliberations except in a judicial inquiry directed by the court.”); *Am. Med. Ass’n*, 26 F. Supp. at 430 (finding that only court could release grand jurors from their oath of secrecy). But see *Atwell v. United States*, 162 F. 97, 101 (4th Cir. 1908) (ruling that grand jurors were not bound to oath of secrecy “after presentment and indictment found, made public, and custody of the accused had, and the grand jury finally discharged”).

result in prosecution for criminal contempt.³⁸ These basic policies continued with the adoption of Rule 6(e), which is discussed in the following sections.

B. Rule 6(e) Prior to September 11th

Prior to the events of September 11th, both the text of Rule 6(e) and the Supreme Court's interpretation of the rule reflected "the orthodox view that all proceedings before the Grand Jury should remain secret unless extraordinary circumstances are present."³⁹

1. The Text of Rule 6(e)

Adoption of Rule 6(e) in 1944 codified the common-law doctrine of grand jury secrecy. Rule 6(e) stated:

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise, a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.⁴⁰

Despite the absence of an express provision permitting contempt as a remedy for unauthorized disclosure, the courts continued to view contempt as the proper sanction for persons who removed the veil of secrecy.⁴¹

³⁸ *Blalock v. United States*, 844 F.2d 1546, 1556–57 (11th Cir. 1988) (citing *In re Summerhayes*, 70 F. 769, 773–74 (N.D. Cal. 1895)).

³⁹ *United States v. Papaioanu*, 10 F.R.D. 517, 518 (D. Del. 1950).

⁴⁰ FED. R. CRIM. P. 6(e) (1976) (amended 1977).

⁴¹ See, e.g., *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965) (identifying contempt as proper sanction for unauthorized disclosure); *United States v. Schiavo*, 375 F. Supp. 475, 478 (E.D. Pa. 1974) (noting that proper sanction for unauthorized disclosure is a contempt proceeding); *United States v. Smyth*, 104 F. Supp. 283, 293 (N.D. Cal. 1952) (concluding that court has inherent power to "discipline the attorneys, the attendants or the grand jurors themselves for breach of the secrecy surrounding the body"). This practice was consistent with the rulemakers' intent as expressed in the notes accompanying the early drafts of the rule. FED. R. CRIM. P. 6 advisory committee's note (Second Preliminary Draft 1944) ("Violation of the rule renders such persons liable to contempt proceedings."), reprinted in 4 DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 20 (Madeleine J. Wilken & Nicholas Triffin eds., 1991) [hereinafter DRAFTING HISTORY].

According to the Advisory Committee, the new rule “continue[d] the traditional practice of secrecy on the part of members of the grand jury, except when the court permits a disclosure.”⁴² Rulemakers never questioned the continuance of this practice. From the preliminary draft, grand jury secrecy was part and parcel of the criminal rules.⁴³ In the notes accompanying the early drafts of the rule,⁴⁴ the Committee specifically pointed to the justifications for secrecy set forth in *United States v. Providence Tribune Co.*,⁴⁵ which warned:

Secrecy is essential to the proceedings of a grand jury for many reasons. Publicity may defeat justice by warning offenders to escape, to destroy evidence, or to tamper with witnesses Secrecy is also required in order that the reputations of innocent persons may not suffer from the fact that their conduct is under investigation, or has been investigated, by a grand jury Secrecy is further required for the protection of witnesses who may go before the grand jury, and to encourage them to make full disclosure of their knowledge of subjects and persons under investigation, without fear of evil consequences to themselves.⁴⁶

The phrase “matters occurring before the grand jury” has been interpreted to protect a wide variety of materials.⁴⁷

[It] includes not only what has occurred and what is occurring, but also what is likely to occur. Encompassed within the rule of secrecy are “the identities of witnesses or jurors, the substance of testimony” as well as actual transcripts, “the strategy or direction of the investigation, the deliberations or questions of jurors, and the like.”⁴⁸

Among other things, grand jury records and transcripts are protected,⁴⁹ as are witness testimony⁵⁰ and reports that summarize or

⁴² FED. R. CRIM. P. 6 advisory committee’s note; *accord* *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 425 (1983).

⁴³ See FED. R. CRIM. P. 7(c) (Advisory Committee’s unpublished preliminary draft 1942), *reprinted in* 1 DRAFTING HISTORY, *supra* note 41, at 50.

⁴⁴ See FED. R. CRIM. P. 6 advisory committee’s note (Second Preliminary Draft 1944), *reprinted in* 4 DRAFTING HISTORY *supra* note 41, at 16–22.

⁴⁵ 241 F. 524 (D.R.I. 1917).

⁴⁶ *Id.* at 526 (citations omitted).

⁴⁷ See generally BRENNER & LOCKHART, *supra* note 13, § 8.4.

⁴⁸ *In re* Motions of Dow Jones & Co., 142 F.3d 496, 500 (D.C. Cir. 1998) (quoting *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1382 (D.C. Cir. 1980) (en banc); *Fund for Constitutional Gov’t v. Nat’l Archives & Records Serv.*, 656 F.2d 856, 869 (D.C. Cir. 1981)).

⁴⁹ BRENNER & LOCKHART, *supra* note 13, § 8.4.1.

analyze materials presented to the grand jury.⁵¹ The goal is to prevent the disclosure of “anything which may reveal what occurred before the grand jury.”⁵²

Under the original Rule 6(e), the sole exception to the requirement of judicial approval involved disclosure to “attorneys for the government for use in the performance of their duties.”⁵³ Given that it was intended to allow disclosure to persons who were already entitled to be present in the grand jury room, this exception (the “government-attorney exception”) was entirely consistent with the doctrine of grand jury secrecy.⁵⁴

In 1977, Rule 6(e) was amended to allow disclosure without judicial approval to “such government personnel . . . as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney’s duty to enforce Federal criminal law.”⁵⁵ Rulemakers justified the disclosure based on government attorneys’ inability to adequately conduct grand jury investigations in the absence of additional government personnel.⁵⁶ In a sense, the government personnel are merely extensions of the government attorney.⁵⁷ Under this exception (the “law enforcement exception”), such personnel are only permitted to use grand jury materials to assist the attorney in enforcing federal criminal law.⁵⁸ Any knowing violation of this secrecy obligation may be considered a contempt of court.⁵⁹ Furthermore, the government attorney is required to promptly notify the court of any disclosure and to specify the government personnel to whom disclosure was made.⁶⁰ The 1977 amendment also expressly provided for the

⁵⁰ *Id.* § 8.4.2.

⁵¹ *Id.* § 8.4.3.

⁵² *In re Grand Jury Matter*, 682 F.2d 61, 63 (3d Cir. 1982).

⁵³ FED. R. CRIM. P. 6(e) (1976) (amended 1977).

⁵⁴ The original advisory committee note to the 1944 version of Rule 6(e) states that “[g]overnment attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence.” FED. R. CRIM. P. 6 advisory committee’s note, *reprinted in* 7 DRAFTING HISTORY, *supra* note 41, at 243.

⁵⁵ FED. R. CRIM. P. 6(e)(3)(A)(ii) (2001) (amended 2002).

⁵⁶ FED. R. CRIM. P. 6 advisory committee’s note (1977 amendments).

⁵⁷ See S. REP. NO. 95-354, at 6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 527, 530 (“Attorneys for the Government in the performance of their duties with a grand jury must possess the authority to utilize the services of other government employees.”).

⁵⁸ FED. R. CRIM. P. 6(e)(3)(B).

⁵⁹ FED. R. CRIM. P. 6(e)(7).

⁶⁰ FED. R. CRIM. P. 6(e)(3)(B).

sanction of contempt for the unauthorized disclosure of grand jury materials.⁶¹ In part, this provision was intended to “allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws.”⁶²

In 1983, Rule 6(e) was amended to permit government attorneys to share grand jury materials with other federal grand juries.⁶³ Again, this exception (the “grand-juror exception”) is not inconsistent with the doctrine of grand jury secrecy: Grand jurors to whom the information is disclosed are bound by their oaths of secrecy.⁶⁴ Finally, in 1985, Rule 6(e) was amended to clarify that state and local government personnel are included within the definition of government personnel to whom disclosure by a government attorney is permitted.⁶⁵ To further safeguard grand jury secrecy, rulemakers required the government attorney making the disclosure to warn the government personnel (federal, state, or local) of the obligation of secrecy.⁶⁶

2. United States v. Sells Engineering: A Narrow Interpretation

The United States Supreme Court provided perhaps the most significant interpretation of Rule 6(e) in *United States v. Sells Engineering, Inc.*⁶⁷ The Court was asked to determine whether government attorneys working for the Civil Division of the Justice Department could access grand jury materials for the purpose of preparing a civil suit.⁶⁸ The Government argued that, since the attorneys for the Civil Division fell within the category of “attorneys for the government,” such materials could automatically be disclosed pursuant to Rule 6(e)(3)(A)(i), the government-attorney exception.⁶⁹ Despite agreeing that Civil Division attorneys fell within that class,⁷⁰

⁶¹ FED. R. CRIM. P. 6(e)(2) (2001) (amended 2002) (“A knowing violation of Rule 6 may be punished as a contempt of court.”) (current version at FED. R. CRIM. P. 6(e)(7)).

⁶² S. REP. NO. 95-354, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 527, 531.

⁶³ FED. R. CRIM. P. 6(e)(3)(C)(iii) (2000) (amended 2001) (current version at FED. R. CRIM. P. 6(e)(3)(C)).

⁶⁴ FED. R. CRIM. P. 6 advisory committee’s note (1983 amendments).

⁶⁵ FED. R. CRIM. P. 6(e)(3)(A)(ii) (2001) (amended 2002).

⁶⁶ FED. R. CRIM. P. 6(e)(3)(B).

⁶⁷ 463 U.S. 418 (1983).

⁶⁸ *Id.* at 420.

⁶⁹ *Id.* at 427.

⁷⁰ *Id.* at 427–28 (noting that “Rule 54(c) defines the phrase expansively, to

the Court concluded that the Government was not entitled to automatic disclosure.⁷¹ Specifically, the Court explained that “[t]he policies of Rule 6 require that any disclosure to attorneys other than prosecutors be judicially supervised rather than automatic.”⁷²

The Court, narrowly interpreting the exception, found that the government-attorney exception only permits disclosure “in the performance of such attorney’s duty.”⁷³ In so doing, the Court ruled that “preparation and litigation of a civil suit by a Justice Department attorney who had no part in conducting the related criminal prosecution” does not fall within that category of duties covered by the exception.⁷⁴ Driven by “the strong historic policy of preserving grand jury secrecy,”⁷⁵ the Court found “disclosure for civil use unjustified by the considerations supporting prosecutorial access.”⁷⁶ In other words, the Court ruled that grand juries may function perfectly well without such disclosure.⁷⁷

The Court’s analysis, however, did not conclude with this finding. Greatly concerned that broad disclosure would increase “the risk of inadvertent or illegal release to others” and “render[] considerably more concrete the threat to the willingness of witnesses to come forward and to testify fully and candidly,”⁷⁸ the Court took great pains to articulate the “affirmative mischief” such disclosure could cause.⁷⁹ Moreover, the Court expressed concern for “the integrity of the grand jury itself,” fearing that the institution might be used for purposes other than criminal investigation and that such misuse might be difficult to ascertain.⁸⁰

include ‘authorized assistants of the Attorney General’” (quoting FED. R. CRIM. P. 54 (1982) (currently as amended at FED. R. CRIM. P. 1(b)(1)(A))). The Attorney General may direct any Justice Department attorney to conduct “any kind of legal proceeding, civil or criminal, including grand jury proceedings” 28 U.S.C. § 515(a) (2000).

⁷¹ *Sells Eng’g*, 463 U.S. at 435.

⁷² *Id.*

⁷³ *Id.* at 428.

⁷⁴ *Id.* at 428–35.

⁷⁵ *Id.* at 428.

⁷⁶ *Id.* at 431.

⁷⁷ *Sells Eng’g*, 463 U.S. at 431.

⁷⁸ *Id.* at 432.

⁷⁹ *Id.* at 431.

⁸⁰ *Id.* at 432–33. A third concern was that the “use of grand jury materials by government agencies in civil or administrative settings threatens to subvert the limitations applied outside the grand jury context on the Government’s powers of discovery and investigation.” *Id.* at 433.

The Government also sought disclosure under then-Rule 6(e)(3)(C)(i),⁸¹ which permitted court-ordered disclosure “preliminarily to or in connection with a judicial proceeding.”⁸² In doing so, the Government attempted to distinguish between cases involving disclosure to government officials and those involving disclosure to private parties.⁸³ When government officials seek disclosure “in furtherance of their responsibility to protect the public weal,” the Government argued, those officials should not be required to demonstrate particularized need.⁸⁴ At the heart of this argument lies the notion that “disclosure of grand jury materials to government attorneys typically implicates few, if any, of the concerns that underlie the policy of grand jury secrecy.”⁸⁵ While acknowledging that the Government’s contention had “some validity,” the Court found the argument “overstated.”⁸⁶ As a result, the Court refused to waive application of the particularized-need standard to government officials.⁸⁷

Thus, prior to September 11th, the only persons to whom grand jury materials could be disclosed without prior judicial approval were government attorneys involved in federal criminal investigations, government personnel assisting government attorneys in federal criminal investigations, and federal grand jurors. Each of these groups is essential to the functioning of a federal grand jury, and each has an obligation of secrecy under Rule 6(e)(2).⁸⁸ All others

⁸¹ FED. R. CRIM. P. 6(e)(3)(C)(i)(I) (2001) (amended 2002) (currently at FED. R. CRIM. P. 6(e)(3)(E)(i)).

⁸² *Sells Eng’g*, 463 U.S. at 442 (internal quotation marks omitted).

⁸³ *Id.*

⁸⁴ *Id.* at 443 (internal quotation marks omitted). Specifically, the Government sought to avoid the application of the standard articulated in *Douglas Oil Co. of California v. Petrol Stops Northwest*:

Parties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed

Sells Eng’g, 463 U.S. at 443 (quoting *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979) (internal quotation marks omitted)).

⁸⁵ *Id.* at 444–45.

⁸⁶ *Id.* at 445.

⁸⁷ *Id.* at 444–45 (noting, however, that “the standard itself accommodates any relevant considerations, peculiar to Government movants, that weigh for or against disclosure in a given case”).

⁸⁸ On September 11, 2001, Rule 6(e) read:

(e) Recording and Disclosure of Proceedings.

(1) *Recording of Proceedings.* All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) *General Rule of Secrecy.* A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) *Exceptions.*

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time,

seeking disclosure, including government officials, were required to obtain judicial approval by demonstrating particularized need.⁸⁹

C. *Rule 6(e) After September 11th*

The terrorist attacks of September 11, 2001 changed lives and laws. Within fifteen months after the attacks, Congress had enacted two massive pieces of legislation aimed at addressing the terrorist

and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) *Sealed Indictments.* The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) *Closed Hearing.* Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) *Sealed Records.* Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

FED. R. CRIM. P. 6(e) (2000) (amended Oct. 26, 2001).

⁸⁹ The requirement that a person seeking disclosure of grand jury materials establish a "particularized need" also applies when a defendant seeks disclosure pursuant to Rule 6(e)(3)(C)(ii). *United States v. Broyles*, 37 F.3d 1314, 1318 (8th Cir. 1994); *accord* *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) (applying original version of Rule 6(e) and concluding that "the burden . . . is on the defense to show that 'a particularized need' exists for the [grand jury] minutes which outweighs the policy of secrecy").

threat: the USA PATRIOT Act of 2001⁹⁰ (“Patriot Act”) and the Homeland Security Act of 2002.⁹¹ Following the release of the *9/11 Commission Report*⁹² in July 2004, Congress responded, yet again, by enacting the far-reaching Intelligence Reform and Terrorism Prevention Act of 2004.⁹³ Each significantly amended the provisions of Rule 6(e).

1. The Patriot Act Amendments

Following September 11th, bipartisan recognition of the need for increased cooperation between law enforcement and the intelligence community grew.⁹⁴ Shortly thereafter, tools to implement such cooperation were integrated into the war on terrorism. The Patriot Act was intended to “deter and punish terrorist acts in the United States and around the world” and “enhance law enforcement investigatory tools.”⁹⁵ Its key function was to break down the historic barriers between federal law enforcement and the intelligence community.⁹⁶

a. The Amendment of Rule 6(e)

Concerned that in the course of criminal investigations grand

⁹⁰ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended at FED. R. CRIM. P. 6 and in scattered sections of 18, 22, 28 and 50 U.S.C.A.) [hereinafter Patriot Act].

⁹¹ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (to be codified as amended primarily in scattered sections of 5, 6, and 18 U.S.C.).

⁹² NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).

⁹³ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (to be codified at FED. R. CRIM. P. 6 and in scattered sections of U.S.C.).

⁹⁴ See 147 CONG. REC. S10,560 (daily ed. Oct. 11, 2001) (statement of Sen. Hatch) (“In this new war, terrorists are a hybrid between domestic criminals and international agents. We must lower the barriers that discourage our law enforcement and intelligence agencies from working together to stop these terrorists. These hybrid criminals call for new, hybrid tools.”); *id.* at S10,556 (statement of Sen. Leahy) (“[F]ew would disagree that information learned in a criminal investigation that is necessary to combating terrorism or protecting the national security ought to be shared with the appropriate intelligence and national security officials.”).

⁹⁵ 115 Stat. at 272.

⁹⁶ See Jim McGee, *An Intelligence Giant in the Making: Anti-Terrorism Law Likely to Bring Domestic Apparatus of Unprecedented Scope*, WASH. POST, Nov. 11, 2001, at A4; *supra* note 94.

juries would obtain information that could prevent terrorist acts,⁹⁷ Congress included a provision in the Patriot Act amending Rule 6(e) to permit⁹⁸ disclosure of grand jury materials without judicial approval⁹⁹

when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)),¹⁰⁰ or foreign intelligence information (as defined in clause (iv) of this subparagraph),¹⁰¹ to

⁹⁷ For example, during floor debate, Senator Graham offered the following hypothetical:

Let me give a couple of hypothetical but eerily-close-to-reality examples. It is likely that there are, tonight, grand juries meeting at various places in the United States to deal with issues related to the events of September 11. Witnesses may be providing information—information about training camps in Afghanistan, ground warfare techniques used by al-Qaida and the Taliban, the types and quantity of weapons available. This type of information will be critical for the military—critical for the military now, not 2 years from now when these cases might go to trial.

147 CONG. REC. S10,566 (daily ed. Oct. 11, 2001) (statement of Sen. Graham).

⁹⁸ Under the new provision, disclosure “may” be made, but is not required. FED. R. CRIM. P. 6(e)(3)(A) (2001) (amended 2002) (current version at FED. R. CRIM. P. 6(e)(3)(D)). *But see infra* text accompanying notes 119–35 (discussing Attorney General’s information-sharing guidelines).

⁹⁹ The House of Representatives’ version of this bill would have required judicial intervention. H.R. REP. NO. 107-236, pt. 1, § 353 (2001).

¹⁰⁰ “The term ‘foreign intelligence’ means information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.” 50 U.S.C. § 401a(2) (2000 & Supp. I 2001). “The term ‘counterintelligence’ means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.” *Id.* § 401a(3).

¹⁰¹ Clause (iv) defines “foreign intelligence information” as:

- (I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against—
 - (aa) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
 - (bb) sabotage or international terrorism by a foreign power or an agent of a foreign power; or
 - (cc) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of foreign power; or
- (II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to—
 - (aa) the national defense or the security of the United States; or
 - (bb) the conduct of the foreign affairs of the United States.

Patriot Act § 202(a)(iv), 115 Stat. at 279–80 (codified as amended at FED. R. CRIM. P. 6(e)(3)(D)(iii)).

any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.¹⁰²

Although Congress' expressed goal was to prevent terrorism, the definitions used encompass an extraordinarily broad range of information, including information unrelated to a threat against the United States or its citizens. For example, "foreign intelligence" includes information relating to the act of a foreign person.¹⁰³ Conceivably, this could include a foreign citizen's plans to take part in a peaceful protest here or abroad or even to buy a loaf of bread.

This new exception (the "Patriot intelligence exception") differs from other exceptions to Rule 6(e) secrecy in two critical respects. First, the Patriot intelligence exception permits prosecutors, acting solely on their own authority, to disclose grand jury materials to persons who are not involved in the prosecution of federal crimes.¹⁰⁴ Unlike those traditional exceptions granting prosecutors the right to disclose grand jury materials,¹⁰⁵ this exception is not grounded in what is necessary to the proper functioning of the grand jury. A grand jury's function is to determine whether there is probable cause that a crime has occurred,¹⁰⁶ not to determine whether a crime could occur in the future. Under the traditional exceptions, a prosecutor might, for example, instruct an FBI agent to obtain physical evidence for submission to the grand jury. To obtain the additional evidence needed by the grand jury to reach a just result, the prosecutor might find it necessary to disclose grand jury materials to the agent. In short, the disclosure would be made with the intent to serve the grand jury.

In contrast, the purpose of the Patriot intelligence exception is fundamentally different. A prosecutor could, for example, report the existence of a financial link between a recent immigrant and a suspected terrorist to an immigration official who was not working for the prosecutor and would not be expected to report back to the grand jury. Moreover, the immigration official could use that

¹⁰² FED. R. CRIM. P. 6(e)(3)(C)(i)(V) (2001) (amended 2002) (current version at FED. R. CRIM. P. 6(e)(3)(D)).

¹⁰³ See *supra* note 100.

¹⁰⁴ Irvin B. Nathan & Christopher D. Man, *The USA PATRIOT Act of 2001 Poses a New Threat to Grand Jury Secrecy*, 9 BUS. CRIMES BULL. 1, 1 (Feb. 2002).

¹⁰⁵ See *supra* notes 53–66 and accompanying text.

¹⁰⁶ BRENNER & LOCKHART, *supra* note 13, § 3.1.

information as part of a deportation proceeding. In other words, disclosures completely unrelated to the functioning of the grand jury are permissible.

Second, the Patriot intelligence exception allows disclosure of grand jury information to persons who are not subject to the same secrecy obligations as other categories of persons to whom grand jury materials may be disclosed without judicial intervention. Pursuant to Rule 6(e)(2)(B), grand jurors, attorneys for the government, and persons to whom disclosure is made under the law enforcement exception are not permitted to disclose matters occurring before the grand jury, except as otherwise provided for in the rules.¹⁰⁷ To illustrate, an FBI agent who receives grand jury materials pursuant to the law enforcement exception¹⁰⁸ may not share those materials with other persons.

Under the Patriot intelligence exception, however, the obligation of secrecy imposed by Rule 6(e)(2) does not apply to persons obtaining information. Instead, Rule 6(e)(3)(D)(i) provides that federal officials receiving information under the new exception “may use the information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information.”¹⁰⁹ The Patriot Act provides no explicit sanction for officials who violate this limitation.¹¹⁰ Indeed, as a practical matter, because no record of those receiving information is filed with the court overseeing the grand jury, identification of violators is unlikely.¹¹¹

¹⁰⁷ FED. R. CRIM. P. 6(e)(2)(B).

¹⁰⁸ FED. R. CRIM. P. 6(e)(3)(A)(ii).

¹⁰⁹ FED. R. CRIM. P. 6(e)(3)(D)(i); *see* 50 U.S.C. § 403-5d (Supp. I 2001) (authorizing sharing of foreign intelligence and counterintelligence information “obtained as part of a criminal investigation” with federal intelligence officials, etc., and mandating that such information be used “only as necessary in the conduct of the person’s official duties subject to any limitations on the unauthorized disclosure of such information”).

¹¹⁰ A court might attempt to rely upon its inherent powers to order a contempt sanction. *See supra* note 41.

¹¹¹ Rule 6(e)(3)(D)(ii) merely provides that “[w]ithin a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court . . . stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.” Its failure to require prosecutors to specifically identify the federal officials to whom disclosure is made contrasts sharply with the requirement that government personnel to whom disclosure is made pursuant to Rule 6(e)(3)(A)(ii) be identified. FED. R. CRIM. P. 6(e)(3)(B).

Arguably, the Patriot intelligence exception significantly undermines the doctrine of grand jury secrecy.¹¹² Unlike traditional exceptions authorizing disclosure for purposes unrelated to the grand jury function,¹¹³ the Patriot intelligence exception does not require judicial intervention or a demonstration of particularized need.

b. The Adoption of Information-Sharing Guidelines

During the debates over the Patriot Act, certain members of Congress voiced concern over the lack of judicial oversight.¹¹⁴ In the end, however, Congress' desire to take swift action to prevent future terrorist attacks prevailed. Conversely, Congress included a mechanism for limiting disclosure. Section 905(a) of the Patriot Act requires the Attorney General to develop guidelines for information sharing between federal law enforcement agencies and the intelligence community.¹¹⁵ These guidelines were to be promulgated after consultation with the Director of the Central Intelligence Agency (CIA).¹¹⁶ Nevertheless, the new guidelines, issued on September 23, 2002, by Attorney General John Ashcroft, do little to safeguard grand jury secrecy.¹¹⁷ In fact, the guidelines make it *more likely* that grand jury materials will be disclosed. While the Patriot intelligence exception¹¹⁸ *permits* disclosure to federal intelligence officials, "these guidelines *require* expeditious disclosure."¹¹⁹

¹¹² Nathan & Man, *supra* note 104, at 1.

¹¹³ See *supra* notes 30–38, 67–89 and accompanying text.

¹¹⁴ 147 CONG. REC. S10,556 (daily ed. Oct. 11, 2001) (statement of Sen. Graham).

¹¹⁵ Patriot Act § 905(a), Pub. L. No. 107-56, 115 Stat. at 388–89 (codified at 50 U.S.C. § 403-5b (Supp. I 2001)).

¹¹⁶ *Id.*

¹¹⁷ Memorandum from John Ashcroft, Attorney General, to Heads of Department of Justice Components & Heads of Federal Departments & Agencies with Law Enforcement Responsibilities, Guidelines Regarding Disclosure to the Director of Central Intelligence and Homeland Security Officials of Foreign Intelligence Acquired in the Course of a Criminal Investigation (Sept. 23, 2002), *available at* <http://www.usdoj.gov/olp/section905a.pdf> [hereinafter Ashcroft Memorandum I].

¹¹⁸ FED. R. CRIM. P. 6(e)(3)(D).

¹¹⁹ Ashcroft Memorandum I, *supra* note 117, Guideline 2, at 2 (emphasis added). Specifically, Guideline 2 states:

Law Enforcement Information Subject to Mandatory Disclosure. Subject to any exceptions established by the Attorney General in consultation with the Director of Central Intelligence (the "Director") and the Assistant to the President for Homeland Security, section 905(a) and these guidelines require expeditious disclosure to the Director, the Assistant to the President for Homeland Security or other members of

The guidelines allow for “exemptions from the mandatory disclosure obligation.”¹²⁰ Requests for exemption “must be submitted by the department, component or agency head in writing [i.e., the United States Attorney] with a complete description of the facts and circumstances giving rise to the need for an exception and why lesser measures such as use restrictions are not adequate.”¹²¹ The Attorney General, on a case-by-case basis,¹²² makes the final determination as to whether an exemption is warranted.¹²³

The standard created by the guidelines is the exact opposite of that applied in every other situation involving prosecutorial release of grand jury materials. Instead of a presumption of secrecy, the guidelines create a presumption of disclosure. Rather than requiring a particularized showing of the need for disclosure, the guidelines require a particularized showing of the need for secrecy.

Furthermore, the guidelines allow for the “originator” of the

the U.S. intelligence community or homeland security agencies as are designated under paragraph 4, *infra*, of foreign intelligence acquired in the course of a criminal investigation conducted by Federal Law Enforcement Agencies.

a. As used herein, the term “foreign intelligence” is defined in section 3 of the National Security Act of 1947 (50 U.S.C. § 401a) as: “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities.”

b. The term “section 905(a) information” means foreign intelligence acquired in the course of a criminal investigation.

c. Section 203(d) of the USA PATRIOT Act provides that: “Notwithstanding any other law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. § 401a)) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.” Thus, no other Federal or state law operates to prevent the sharing of such information so long as disclosure of such information will assist the Director and the Assistant to the President for Homeland Security in the performance of their official duties, and Federal Law Enforcement Agencies shall, notwithstanding any other law, expeditiously disclose to the Recipients (as defined below) section 905(a) information.

¹²⁰ Ashcroft Memorandum I, *supra* note 117, Guideline 9, at 6.

¹²¹ *Id.* Guideline 9(c), at 6.

¹²² *Id.*

¹²³ *Id.* Guideline 9(b), at 6. In making this determination, the Attorney General is to consult with the CIA Director and the Assistant to the President for Homeland Security. *Id.*

information to partially restrict its use.¹²⁴ As a general rule, information disclosed under the guidelines will be disclosed “free of any originator controls or information use restrictions.”¹²⁵ Use of grand jury materials may be restricted “to comply with notice and record keeping requirements and to protect sensitive law enforcement sources and ongoing criminal investigations and prosecutions.”¹²⁶ Any restrictions on use, however, “shall be no more restrictive than necessary to accomplish the desired effect.”¹²⁷ Unless the information contained within the grand jury materials relates to potential terrorism or weapons of mass destruction, the prosecuting official assigned to the case must be consulted prior to disclosure.¹²⁸

Again, this rule runs counter to the standard applied to every other prosecutorial release of grand jury materials. In the absence of use restrictions, as long as recipients of the materials believe that disclosure is necessary to conduct their duties, they may share the information with anyone they choose.¹²⁹ Under the pre-September 11th exceptions, “second generation” recipients did not exist. Those who received grand jury materials from a prosecutor were prohibited from re-disclosing them to further-removed recipients.¹³⁰ Conversely, now neither Rule 6(e) nor the guidelines purport to limit second generation recipients’ use of grand jury materials. Once this level of disclosure is reached, any pretense of secrecy is a thing of the past.

Notably, the Attorney General’s guidelines differentiate between, on the one hand, the treatment of materials relating to “a

¹²⁴ *Id.* Guideline 8, at 6.

¹²⁵ *Id.* Guideline 8(a), at 6.

¹²⁶ Ashcroft Memorandum I, *supra* note 117, Guideline 8(c), at 6.

¹²⁷ *Id.* Guideline 8(b)(i), at 6.

¹²⁸ *Id.* Guideline 5(c), at 4–5. The disclosure must be made “no later than 48 hours after the prosecutor is initially notified.” *Id.* at 4.

¹²⁹ FED. R. CRIM. P. 6(e)(3)(D)(i). Executive Order No. 12,333 may afford “United States persons” some protections. Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,950 (Dec. 4, 1981). The order limits intelligence agencies’ ability “to collect, retain or disseminate information concerning United States persons.” *Id.* Before disclosing grand jury materials identifying United States persons to federal intelligence officials, the prosecutor must label the materials as containing identifying information. Memorandum from John Ashcroft, Attorney General, to Heads of Department Components, Guidelines for Disclosure of Grand Jury and Electronic, Wire, and Oral Interception Information Identifying United States Persons 1 (Sept. 23, 2002), *available at* <http://www.usdoj.gov/olp/section203.pdf>. Under certain circumstances, the receiving agency may delete identifying references to United States persons. *Id.* at 2.

¹³⁰ *See generally supra* notes 54–66 and accompanying text.

potential terrorism¹³¹ or a Weapons of Mass Destruction¹³² threat to the United States homeland, its critical infrastructure, key resources (whether physical or electronic) or to United States persons or interests worldwide” and, on the other hand, the treatment of other grand jury materials subject to disclosure under the Patriot intelligence exception.¹³³ The former must be disclosed to the proper authorities “immediately,” while the latter must be disclosed “as expeditiously as possible.”¹³⁴ Under the “as expeditiously as possible” standard, the prosecutor has forty-eight hours to identify use restrictions or request an exception to the disclosure requirement from the Attorney General.¹³⁵

c. The Use of the Patriot Intelligence Exception

Any question as to whether the Patriot intelligence exception would be used was quickly answered. Between September 11, 2001, and July 26, 2002, there were approximately forty disclosures of federal grand jury materials containing foreign intelligence information.¹³⁶ These disclosures involved thirty-nine separate grand juries.¹³⁷

¹³¹ “Terrorism Information” is defined as:

All information relating to the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of foreign or international terrorist groups or individuals or threats posed by such groups or individuals to the United States, United States persons, or United States interests, or to those of other nations, or to communications between such groups or individuals, or information relating to groups or individuals reasonably believed to be assisting or associated with them.

Ashcroft Memorandum I, *supra* note 117, Guideline 5(a) (i), at 4.

¹³² “Weapons of Mass Destruction (WMD) Information” is defined as: “All information relating to conventional explosive weapons and non-conventional weapons capable of causing mass casualties and damage, including chemical, biological, radiological and nuclear agents and weapons and the means of delivery of such weapons.” *Id.* Guideline 5(a) (ii), at 4.

¹³³ *Id.* Guideline 5(a), at 3.

¹³⁴ *Id.*

¹³⁵ *Id.* Guideline 5(a), (c), at 3, 4–5.

¹³⁶ Letter from Daniel J. Bryant, Assistant Attorney General, to the Honorable F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary, enclosing Questions Submitted by the House Judiciary Committee to the Attorney General on USA PATRIOT Act Implementation 1 (July 26, 2002) [hereinafter Bryant Letter (July 26, 2002)] (on file with author).

¹³⁷ Letter from Daniel J. Bryant, Assistant Attorney General, to the Honorable F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary, enclosing Follow-up Questions Submitted by the House Judiciary Committee to the Attorney

Interestingly, twenty-seven of the disclosures made during this period involved the use of pre-Patriot Act procedure.¹³⁸ On September 20, 2002, the Justice Department informed the House Judiciary Committee that “grand jury information was shared under Rule 6(e)(3)(A)(ii),” the law enforcement exception, which permits disclosure *without court approval* to government personnel of materials needed to help prosecutors enforce federal criminal law.¹³⁹ However, on October 4, 2002, the Justice Department reported that the districts involved “filed a motion and obtained an order from the court permitting such disclosure.”¹⁴⁰

Given that the law enforcement exception permits disclosure without a court order, this discrepancy is puzzling. Ostensibly, prosecutors either sought court approval of a Rule 6(e)(3)(A)(ii) disclosure as a check on their decision-making authority or sought disclosure pursuant to former Rule 6(e)(3)(C)(i),¹⁴¹ which permitted court-ordered disclosure. Regardless of which provision was used, sharing information with the intelligence community is problematic.¹⁴²

If the prosecutor’s purpose is to obtain additional information for a federal criminal case under investigation, use of the law enforcement exception¹⁴³ is legitimate.¹⁴⁴ If, for example, a

General on USA Patriot Act Implementation 1 (Sept. 20, 2002) [hereinafter Bryant Letter (Sept. 20, 2002)] (on file with author). Presumably, the bulk of these disclosures were made prior to the enactment of the Patriot Act.

¹³⁸ Letter from Daniel J. Bryant, Assistant Attorney General, to the Honorable F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary 1 (Oct. 4, 2002) [hereinafter Bryant Letter (Oct. 4, 2002)] (on file with author).

¹³⁹ Bryant Letter (Sept. 20, 2002), *supra* note 137, at 1.

¹⁴⁰ Bryant Letter (Oct. 4, 2002), *supra* note 138, at 1.

¹⁴¹ FED. R. CRIM. P. 6(e)(3)(C)(i) (2000) (amended 2001) (currently at FED. R. CRIM. P. 6(e)(3)(E)).

¹⁴² Indeed, at least one senator based her support for amending Rule 6(e) on the belief that “[u]nder current law, law enforcement officials involved in a grand jury investigation cannot share information gathered in the grand jury with the intelligence community, even if that information would prevent a future terrorist act.” 147 CONG. REC. S10,592 (statement of Sen. Feinstein).

¹⁴³ FED. R. CRIM. P. 6(e)(3)(A)(ii).

¹⁴⁴ The Justice Department explained,

[i]n the context of the 9/11 investigation, grand jury information was shared with members of numerous JTTFs [Joint Terrorism Task Forces] around the country who participated in the PENTBOMB [September 11th] investigation as well as the representatives of the various agencies stationed at SIOC [Strategic Information and Operations Center]. The reason for this is that it is often necessary to disclose grand jury information to those involved in an investigation in

prosecutor needed the help of the CIA in obtaining information about a foreign target to present to the grand jury, a CIA agent might fall within the category of government personnel to whom disclosure is permitted. But if the prosecutor's intent is not to enforce federal criminal law, but rather to inform the CIA of a threat to national security, the law enforcement exception does not apply. Additionally, a CIA agent who receives grand jury materials under this exception may not disclose them to others.¹⁴⁵ If the Justice Department's intent in making the disclosures was to address a threat to national security, an absolute ban on further disclosure seems unworkable.

In contrast, former Rule 6(e)(3)(C)(i),¹⁴⁶ which permitted court-ordered disclosure "preliminarily to or in connection with a judicial proceeding," would not impose an obligation of secrecy upon the recipient.¹⁴⁷ Again, however, this exception does not appear to apply to situations in which the disclosure is intended to protect national security interests. In *United States v. Baggot*,¹⁴⁸ the Supreme Court strictly construed this language, holding that "the Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. . . . If the primary purpose of disclosure is not to assist in preparation or conduct of a judicial proceeding, disclosure under (C)(i) is not permitted."¹⁴⁹ Thus, the fact that "litigation is factually likely to emerge" from an investigation of a national security threat would not support disclosure under former Rule 6(e)(3)(C)(i).¹⁵⁰

The remaining disclosures that were made during the period from September 11, 2001, to July 2002, were made pursuant to the Patriot intelligence exception. According to the Justice Department, all of the reporting districts¹⁵¹ invoking the new exception had filed

order to take necessary follow-up steps to advance the investigation.

Bryant Letter (Sept. 20, 2002), *supra* note 137, at 1.

¹⁴⁵ See *supra* notes 55–62 and accompanying text.

¹⁴⁶ FED. R. CRIM. P. 6(e)(3)(C)(i) (2000) (amended 2001) (currently at FED. R. CRIM. P. 6(e)(3)(E)(i)).

¹⁴⁷ Rule 6(e)(2)'s obligation of secrecy applies only to grand jurors, interpreters, persons recording or transcribing testimony, prosecutors, and persons to whom disclosure is made under the law enforcement exception. FED. R. CRIM. P. 6(e)(2).

¹⁴⁸ 463 U.S. 476 (1983).

¹⁴⁹ *Id.* at 480.

¹⁵⁰ *Id.*

¹⁵¹ At the time the Justice Department made its report, thirty-six of the thirty-eight districts involved in the disclosure of intelligence materials had reported. Bryant Letter (Oct. 4, 2002), *supra* note 138, at 1.

the required notice of disclosure with the court supervising the grand jury through which the information was obtained.¹⁵² Thus far, the supervising courts have not complained about the timeliness of the notices filed.¹⁵³

The Justice Department provided the House Judiciary Committee with a redacted exemplar¹⁵⁴ that provides some helpful insights into how the exception is being used.¹⁵⁵ The most striking

¹⁵² *Id.*

¹⁵³ *Id.* According to the Justice Department, “[t]he courts supervising the grand juries are responsible for supervising the filing of notices and for disciplining any failure to file such notices.” Bryant Letter (Sept. 20, 2002), *supra* note 137, at 1. How the supervising court would ever learn of a failure to file is an open question.

¹⁵⁴ Bryant Letter (Oct. 4, 2002), *supra* note 138, at 1.

¹⁵⁵ The notices are provided in the form of pleadings filed under seal. The sample notice reads:

Pursuant to Section 203(a) of the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 279 (2001), codified as Fed. R. Crim. P. 6(e)(3)(C), the undersigned attorney for the government hereby provides notice to the Court regarding the disclosure to certain Federal departments, agencies, and entities of criminal investigative information that may include “matters occurring before” the above-captioned grand jury regarding xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx and related criminal activity, as follows:

1. Grand juries empaneled in this district have issued subpoenas and engaged in other investigative activities in conjunction with xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx and related criminal activity. To the extent that information relating to the grand juries’s [sic] activities constitutes “matters occurring before the grand jury” within the meaning of Rule 6(e)(2) of the Federal Rules of Criminal Procedure, it may not be disclosed “except as otherwise provided for” under the Rules. *See* Fed. R. Crim. P. 6(e)(2).

2. Section 203(a) of the USA PATRIOT Act, which was signed into law on October 26, 2001, amends Rule 6(e)(3)(C)(i) to authorize disclosure of matters occurring before the grand jury:

(V) when the matters involve foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. 401a)), or foreign intelligence information (as defined in clause (iv) of this subparagraph), to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties.

Fed. R. Crim. P. 6(e)(3)(C)(i)(V).

3. The investigation into the September 11 attacks and related criminal activity involves such “foreign intelligence” or “counterintelligence” and “foreign intelligence information.” Moreover, the sharing of information developed during the investigation assists a variety of “Federal law enforcement, intelligence, protective, immigration, national defense, [and] national security

feature of the exemplar is the sheer breadth of the disclosure. The court is informed that the intelligence interests in question “involve literally thousands of Federal law enforcement and other officials.”¹⁵⁶ The recipients include everyone from the CIA to the Social Security Administration Inspector General.¹⁵⁷ Such widespread dissemination of grand jury materials is unprecedented. Under the new exception,

official[s]” in the performance of their official duties. Consequently, criminal investigative information, which may include matters occurring before grand juries, has been disclosed and will continue to be disclosed to such officials. Of course, an official who receives such information “may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information.” Fed. R. Crim. P. 6(e)(3)(C)(iii).

4. The amended rule requires that, “[w]ithin a reasonable time after such disclosure, an attorney for the government shall file under seal a notice with the court stating the fact that such information was disclosed and the departments, agencies, or entities to which disclosure was made.” *Id.* Unlike the notice required in other contexts, *see* Fed. R. Crim. P. 6(e)(3)(B), in matters involving these sort of intelligence interests, which may (as in this case) involve literally thousands of Federal law enforcement and other officials, the rule does not require the notice to name each individual official to whom the grand jury information has been disclosed, only their “departments, agencies, or entities.”

5. Accordingly, the undersigned attorney for the government hereby notifies the Court that information relating to the above-captioned grand jury investigations, which may include “matters occurring before the grand jury,” has been and will be disclosed to the following Federal departments, agencies, and entities pursuant to Fed. R. Crim. P. 6(e)(C)(i)(V):

- (a) Department of Justice (including Federal Bureau of Investigation).
- (b) Department of Treasury.
- (c) Department of Defense.
- (d) Department of State.
- (e) Department of Transportation.
- (f) Department of Energy.
- (g) Postal Inspection Service.
- (h) Central Intelligence Agency.
- (i) National Security Agency.
- (j) National Security Council.
- (k) Naval Criminal Investigative Service [sic]
- (l) Nuclear Regulatory Commission.
- (m) Federal Aviation Administration.
- (n) Social Security Administration Inspector General.

Bryant Letter (Sept. 20, 2002), *supra* note 137, app. (alterations in original) (footnotes omitted).

¹⁵⁶ *Id.*

¹⁵⁷ *See id.*

prosecutors are not even constrained by the need to list the individual recipients of the information.¹⁵⁸ Unmistakably, passage of the Patriot Act ushered in a new era in the use of federal grand jury materials.

2. The Intelligence Reform and Terrorism Prevention Amendments

The new era continued with the passage of yet more far-reaching legislation in the form of the Homeland Security Act of 2002¹⁵⁹ and the Intelligence Reform and Terrorism Prevention Act of 2004.¹⁶⁰

a. The Homeland Security Act and the Purported Amendment of Rule 6(e)

While much of the public's attention to the Homeland Security Act of 2002 was directed towards provisions creating a new cabinet-level Department of Homeland Security, the Act also included provisions that purported to amend Rule 6(e) yet again.¹⁶¹ The concern that the improvements in information sharing wrought by the enactment of the Patriot Act did not go far enough prompted the amendment.¹⁶² Specifically, legislators expressed their concern that the Patriot Act failed to bring state and local officials into the information loop.¹⁶³ These officials were believed to be in the vanguard of the war on terrorism.¹⁶⁴ It was Congress' sense "that

¹⁵⁸ The Justice Department described the Rule 6(e)(3)(A)(ii) requirement that prosecutors list each individual to whom information is disclosed as "onerous and a diversion of resources from investigative activity." Bryant Letter (Sept. 20, 2002), *supra* note 137, at 1.

¹⁵⁹ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (to be codified as amended primarily in scattered sections of 5, 6, and 18 U.S.C.).

¹⁶⁰ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (to be codified at FED. R. CRIM. P. 6 and in scattered sections of U.S.C.).

¹⁶¹ See Homeland Security Act § 895, 116 Stat. at 2256-57. The Homeland Security Act incorporated provisions from an earlier bill, the Homeland Security Information Sharing Act, H.R. 4598, 107th Cong. (2002), Homeland Security Act § 891, 116 Stat. at 2252-53 (codified at 6 U.S.C.A. § 481 (West Supp. 2004)). See 148 Cong. Rec. H3936-48 (daily ed. June 26, 2002).

¹⁶² See, e.g., 148 CONG. REC. H3939 (statement of Rep. Sensenbrenner).

¹⁶³ See, e.g., *id.*

¹⁶⁴ Congress specifically found that "[s]ome homeland security information is needed by the State and local personnel to prevent and prepare for terrorist attack" and that "State and local personnel have capabilities and opportunities to gather information on suspicious activities and terrorist threats not possessed by Federal agencies." Homeland Security Act § 891(b)(4), (8), 116 Stat. at 2252 (codified at 6

Federal, State, and local entities should share homeland security information to the maximum extent possible.”¹⁶⁵ Legislators also voiced concerns that the Patriot Act failed to address the problem of domestic terrorism.¹⁶⁶

To address these concerns, Congress passed an amendment to Rule 6(e) that would allow disclosure without judicial approval

when matters involve a threat of actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, domestic or international sabotage, domestic or international terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, to any appropriate federal, state, local, or foreign government official for the purpose of preventing or responding to such a threat.¹⁶⁷

U.S.C.A. § 481 (West Supp. 2004)).

¹⁶⁵ *Id.* § 891(c), 116 Stat. at 2253.

¹⁶⁶ 148 CONG. REC. H3939; *see also* H.R. REP. NO. 107-534, pt. 1, § 6 (2002) (“Domestic threat information is included because it is not always clear whether threats to public safety result from international or domestic terrorism threats. The anthrax attacks are one example of where the origin of that attacks [sic] is not clear.”).

¹⁶⁷ Homeland Security Act § 895, 116 Stat. at 2256 (codified as amended at FED. R. CRIM. P. 6(e)(3)(D)). The Act also sought to amend the language of existing Rule 6(e)(3)(A)(ii) to include personnel of a foreign government among those to whom an attorney for the government may disclose grand jury materials when needed to assist in enforcing federal criminal law. *Id.* § 895(1). Under this provision, a prosecutor disclosing grand jury materials to a foreign official would be required to provide the official’s name to the court that impaneled the grand jury. FED. R. CRIM. P. 6(e)(3)(B). Foreign officials receiving grand jury materials pursuant to this exception would have an obligation of secrecy under existing Rule 6(e)(2). Additionally, the Act sought to amend then Rule 6(e)(3)(C)(i)(I) to expressly allow a court to order disclosure “upon request by an attorney by the government when sought by a foreign court or prosecutor for use in an official criminal investigation.” Homeland Security Act § 895(2)(B)(i), 116 Stat. at 2256. In so doing, the Act clarified that at least some foreign proceedings qualify as “judicial proceedings” under Rule 6. Similarly, the Act sought to amend then Rule 6(e)(3)(C)(i)(IV) to expressly permit a court to order disclosure of a violation of foreign criminal law to a foreign official for the purpose of enforcing that law. *Id.* § 895(2)(B)(ii). This amendment was considered necessary because,

even when the Government [made] an appropriate showing to the court (i.e., a showing similar to that required for disclosure of grand jury material in a domestic proceeding), the rule as . . . written [did] not expressly authorize courts to order disclosure. As a consequence, the U.S. prosecutor sometimes [was forced to] re-subpoena the same information from the original sources.

H.R. REP. NO. 107-534, pt. 1, § 6.

The Homeland Security Act amendments were supposed to become effective sixty days after their date of enactment.¹⁶⁸ In drafting the amendments, however, Congress failed to consider the amendment and restructuring of Rule 6(e) that came into effect on December 1, 2002.¹⁶⁹ This restructuring made the amendments incapable of being

¹⁶⁸ Homeland Security Act § 4, 116 Stat. at 2142.

¹⁶⁹ See FED. R. CRIM. P. 6 historical notes to 2002 amendments. As of December 1, 2002, Rule 6(e) (2), (3) read:

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule

6(e) (2) (B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e) (3) (A) (ii) or (iii);

(3) Exceptions.

(A) Disclosure of a grand jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel—including those of a state or state subdivision or of an Indian tribe—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e) (3) (A) (ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e) (3) (D) (iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties.

(i) Any federal official who receives information under Rule 6(e) (3) (D) may use the information only as necessary in the conduct

of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

- actual or potential attack or other grave hostile acts of a foreign power or its agent;
- sabotage or international terrorism by a foreign power or its agent; or
- clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

- the national defense or the security of the United States; or
- the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law; or

(iv) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is *ex parte*—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

- (i) an attorney for the government;
- (ii) the parties to the judicial proceeding; and
- (iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for

executed.¹⁷⁰ Although President George W. Bush immediately indicated that he planned to seek technical amendments from Congress to permit the provisions to go into effect,¹⁷¹ these amendments were never enacted. The fact that Congress amended Rule 6(e) without taking into account its planned restructuring underscores the haste with which it reached its decision to alter centuries-old policies.

b. The Amendment of Rule 6(e)

The release of the *9/11 Commission Report*¹⁷² in July 2004 spurred Congress to further address the issues of intelligence reform and terrorism prevention.¹⁷³ These efforts culminated in the enactment of the Intelligence Reform and Terrorism Prevention Act of 2004,¹⁷⁴ which, while perhaps best known for establishing a Director of National Intelligence, also included provisions affecting grand jury

continued grand jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

FED. R. CRIM. P. 6(e)(2)–(3) (2002) (amended 2004).

Along with restyling Rule 6(e), the 2002 amendments contained some noteworthy substantive changes. Under Rule 6(e)(3)(A)(iii), a prosecutor may disclose grand jury materials to a government attorney for purposes of enforcing civil forfeiture and civil banking laws under 18 U.S.C. § 3322. This provision was added to ensure that the amendments to Rule 6 did not supercede section 3322. FED. R. CRIM. P. 6. advisory committee's note (2002 amendments). Underlying section 3322 is the idea that "[b]ecause all civil forfeiture actions are now recognized as law enforcement functions, grand jury information should be available to government attorneys for their use in all civil forfeiture cases." H.R. REP. NO. 105-358, pt. 1, § 8 (1997). Furthermore, Rule 6(e)(3)(A)(ii) now expressly recognizes that to enforce federal criminal law a prosecutor may need to disclose information to government personnel of an Indian tribe. FED. R. CRIM. P. 6. advisory committee's note (2002 amendments).

¹⁷⁰ FED. R. CRIM. P. 6 historical notes to 2002 amendments. The renumbering of Rule 6(e)'s sections made it impossible to make the requested insertions. See Statement of President George W. Bush on the Signing of H.R. 5005, the Homeland Security Act of 2002 (Nov. 25, 2002), 2002 WL 31650677, at *5 [hereinafter President's Statement].

¹⁷¹ President's Statement, *supra* note 170, at *5.

¹⁷² NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 COMMISSION REPORT (2004).

¹⁷³ See, e.g., 150 CONG. REC. S11,859 (daily ed. Dec. 7, 2004) (statement of Sen. Frist).

¹⁷⁴ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (to be codified at FED. R. CRIM. P. 6 and in scattered sections of U.S.C.).

secrecy.¹⁷⁵ These provisions were intended to restore the amendments created by the Homeland Security Act.¹⁷⁶ In certain respects, the changes that the Patriot Act wrought to Rule 6(e) pale in comparison to those Congress created via the Intelligence Reform and Terrorism Prevention Act. The amendments to Rule 6 within the Intelligence Reform and Terrorism Prevention Act further erode the doctrine of grand jury secrecy. Most significantly, one amendment creates a new exception which allows disclosure without judicial approval of

any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.¹⁷⁷

By permitting prosecutors to disclose grand jury materials to persons who are not intimately involved in the prosecution of federal crimes, Congress has again created an exception that fundamentally diverges from the traditional exceptions.¹⁷⁸ In contrast to the traditional exceptions controlling disclosure to persons unrelated to the grand jury function,¹⁷⁹ the new exception (the “terrorism prevention exception”) requires no judicial intervention and no

¹⁷⁵ *Id.* § 6501(a), 118 Stat. at 3760 (codified at FED. R. CRIM. P. 6(e)).

¹⁷⁶ 150 CONG. REC. S11,995 (daily ed. Dec. 8, 2004) (statement of Sen. Kyl).

¹⁷⁷ Intelligence Reform and Terrorism Prevention Act § 6501(a) (codified at FED. R. CRIM. P. 6(e)(3)(d)). The Act also amends the language of existing Rule 6(e)(3)(A)(ii) to include personnel of a foreign government among those to whom an attorney for the government may disclose grand jury materials when needed to assist in enforcing federal criminal law. *Id.* § 6501(a)(1)(A). Under this provision, a prosecutor disclosing grand jury materials to a foreign official would be required to provide the official’s name to the court that impaneled the grand jury. FED. R. CRIM. P. 6(e)(3)(B). Foreign officials receiving grand jury materials pursuant to this exception would have an obligation of secrecy under existing Rule 6(e)(2). Additionally, the Act adds Rule 6(e)(3)(E)(iii) to expressly allow a court to order disclosure “at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation.” Intelligence Reform and Terrorism Prevention Act § 6501(a)(1)(C)(ii). In so doing, the Act clarified that at least some foreign proceedings qualify as “judicial proceedings” under Rule 6. Similarly, the Act amended existing Rule 6(e)(3)(E)(iv) to expressly permit a court to order disclosure of a violation of foreign criminal law to a foreign official for the purpose of enforcing that law. *Id.* § 6501(a)(1)(C)(iii).

¹⁷⁸ See *supra* notes 54–66 and accompanying text.

¹⁷⁹ See *supra* notes 67–89 and accompanying text.

showing of particularized need.¹⁸⁰

Several aspects of this new exception are disquieting. First, the Act poorly defines the types of information subject to disclosure. In drafting the Patriot Act amendments, Congress specifically defined “foreign intelligence” and other categories of information that may be disclosed.¹⁸¹ Although arguably broad, these definitions place some limits on disclosure. The Intelligence Reform and Terrorism Prevention Act, on the other hand, provides no such limits. For example, “domestic . . . terrorism”¹⁸² is susceptible to multiple interpretations. If a prosecutor learns via grand jury testimony of a planned antiwar sit-in, may the prosecutor inform intelligence officials of the identity of the demonstration’s planners?¹⁸³ The question of where “ordinary” crime ends and “domestic terrorism” begins is left unanswered.¹⁸⁴

Second, because information may be given to any “appropriate” official,¹⁸⁵ the Act does not limit the categories of government officials to whom information may be disclosed. While Congressional testimony¹⁸⁶ and debate¹⁸⁷ on both the Homeland Security Act and the

¹⁸⁰ FED. R. CRIM. P. 6(e)(3)(D).

¹⁸¹ See *supra* notes 100–01 and accompanying text.

¹⁸² See, e.g., Intelligence Reform and Terrorism Prevention Act § 6501(a), 118 Stat. at 3760.

¹⁸³ Allowing individual prosecutors to determine when disclosure is warranted will likely lead to inconsistent interpretations.

¹⁸⁴ Federal criminal law defines “domestic terrorism” as activities that:

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C. § 2331(5) (2000 & Supp. I 2001).

¹⁸⁵ Intelligence Reform and Terrorism Prevention Act § 6501(a)(1)(B)(i).

¹⁸⁶ See, e.g., *A Review of the Tools to Fight Terrorism Act: Hearing Before the Sen. Judiciary Comm. Subcomm. On Terrorism, Technology, and Homeland Security*, 108th Cong. (2004) (statement of Jonathan Turley, Professor, George Washington University Law School) (“This provision allows for the sharing of national security and grand-jury information with state and local governments. It was previously enacted by Congress and has only been reintroduced due to the Supreme Court’s revision of the Federal Rules of Criminal Procedure.”); *The Homeland Security Information Sharing Act: Hearing on H.R. 4598 Before the House Judiciary Subcomm. on Crime*, 107th Cong. (2002) (statement of Rep. Chambliss).

¹⁸⁷ See, e.g., 150 CONG. REC. S11,995 (daily ed. Dec. 8, 2004) (statement of Sen. Kyl); 148 CONG. REC. H3941–42 (daily ed. June 26, 2002) (statement of Rep.

Intelligence and Terrorism Prevention Act amendments centered on the need to involve state and local officials in the war on terrorism, the new exception also permits disclosure to foreign officials. Nothing in the Congressional record explains this decision.¹⁸⁸ Indeed, there is no discussion of the unique risks disclosure to noncitizens and nonresidents might create for the grand jury process.

Moreover, the language of the terrorism prevention exception contrasts sharply with that of the Patriot intelligence exception, which provides a list of approved categories of disclosees.¹⁸⁹ Given that the terrorism prevention exception is intended to prevent acts such as terrorism and sabotage, and that the circumstances surrounding such acts would be highly variable, the desire to allow some leeway as to the selection of the appropriate official is understandable.¹⁹⁰ Nonetheless, the complete lack of boundaries creates unprecedented access to grand jury materials.

Perhaps because Congress had already approved the terrorism prevention exception as part of the Homeland Security Act,¹⁹¹ its inclusion in the Intelligence Reform and Terrorism Prevention Act elicited almost no comment.¹⁹² Though legislators involved in the

Weiner).

¹⁸⁸ Still, the possible ramifications of this provision did not go unnoticed by all. In analyzing the potential amendment, the Congressional Research Service noted, "It remains to be seen how the courts will respond to the use of the grand jury as an intelligence gathering device for foreign officials." CONG. RESEARCH SERV., H.R. 10 (9/11 RECOMMENDATIONS IMPLEMENTATION ACT) AND S. 2845 (NATIONAL INTELLIGENCE REFORM ACT OF 2004): A COMPARATIVE ANALYSIS 41 (2004), *available at* <http://www.fas.org/irp/crs/RL32635.pdf> (updated Oct. 21, 2004).

¹⁸⁹ See *supra* note 102 and accompanying text.

¹⁹⁰ Rule 6(e) permits disclosure to "any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official." FED. R. CRIM. P. 6(e)(3)(D). The term "appropriate" is neither defined nor limited in any way. See *id.*

¹⁹¹ Homeland Security Act § 895, Pub. L. No. 107-296, 116 Stat. at 2156. See *supra* notes 172–180 and accompanying text.

¹⁹² During the consideration of the conference report on the Intelligence Reform and Terrorism Prevention Act of 2004, Senator John Kyl provided the sole commentary on the changes to Rule 6(e). His analysis was as follows:

Subtitle F, section 6501, Sharing Grand-Jury Information With State and Local Governments, this section amends current law to authorize the sharing of grand-jury information with appropriate state and local authorities.

I do not think that one can overstate the importance of information sharing, of tearing down the walls that prevent different parts of the Government from exchanging intelligence and working together in the war on terror. A graphic illustration of the importance of streamlined information sharing is provided by another pre-September

11 investigation. Like the Moussaoui case, this investigation also came tantalizing close to substantially disrupting or even stopping the 9/11 plot, and also ultimately was blocked by a flaw in our antiterror laws. The investigation to which I refer involved Khalid Al Midhar [sic], one of the suicide hijackers of American Airlines Flight 77, which was crashed into the Pentagon, killing 58 passengers and crew and 125 people on the ground.

An account of the investigation of Midhar [sic] is provided in the 9/11 Commission's staff Statement No. 10. That statement notes as follows: During the summer of 2001 <an FBI official> . . . found <a> cable reporting that Khalid Al Mihdhar had a visa to the United States. A week later she found the cable reporting that Mihdhar's visa application—what was later discovered to be his first application—listed New York as his destination. . . . The FBI official grasped the significance of this information.

The FBI official and an FBI analyst working the case promptly met with an INS representative at FBI Headquarters. On August 22 INS told them that Mihdhar had entered the United States on January 15, 2000, and again on July 4, 2001. . . . The FBI agents decided that if Mihdhar was in the United States, he should be found.

These alert agents immediately grasped the danger that Khalid Al Midhar [sic] posed to the United States, and immediately initiated an effort to track him down. Unfortunately, at the time, the law was not on their side. The Joint Inquiry Report of the House and Senate Intelligence Committees describes what happened next:

Even in late August 2001, when the CIA told the FBI, State, INS, and Customs that Khalid al-Mihdhar, Nawaf al-Hazmi, and two other "Bin Laden-related individuals" were in the United States, FBI Headquarters refused to accede to the New York field office recommendation that a criminal investigation be opened, which might allow greater resources to be dedicated to the search for the future hijackers. . . . FBI attorneys took the position that criminal investigators "CAN NOT" (emphasis original) be involved and that criminal information discovered in the intelligence case would be "passed over the wall" according to proper procedures. An agent in the FBI's New York field office responded by e-mail, saying: "Whatever has happened to this, someday someone will die and, wall or not, the public will not understand why we were not more effective in throwing every resource we had at certain problems."

The 9/11 Commission staff report assesses the ultimate impact of these legal barriers:

Many witnesses have suggested that even if Mihdhar had been found, there was nothing the agents could have done except follow him onto the planes. We believe this is incorrect. Both Hazmi and Mihdhar could have been held for immigration violations or as material witnesses in the Cole bombing case. Investigation or interrogation of these individuals, and their travel and financial activities, also may have yielded evidence of connections to other participants in the 9/11 plot. In any case, the opportunity did not arise.

Congress must do what it can now to make sure that something like this does not happen again—that arbitrary, seemingly minor bureaucratic barriers are not allowed to undermine our best leads toward uncovering an attack on the United States. Section 6501 is a

passage of the Homeland Security Act expressed some concern over the disclosure of grand jury information,¹⁹³ they believed that the proposed amendments contained adequate safeguards to protect grand jury secrecy.¹⁹⁴ As with persons receiving grand jury materials under the Patriot intelligence exception, the obligation of secrecy imposed by Rule 6(e)(2) does not apply to persons obtaining information under the terrorism prevention exception. Still, there are some limitations on use. Officials receiving grand jury materials pursuant to this exception may use it only as needed in the conduct of their duties.¹⁹⁵ Specifically, officials must use the materials for the purpose specified by the exception: “preventing or responding to . . . [a] threat.”¹⁹⁶ Joint guidelines from the Attorney General and the Director of National Intelligence may impose additional limitations on use by state, local, and foreign officials.¹⁹⁷ Those officials may be punished for contempt of court for any violation of that obligation.¹⁹⁸

The effectiveness of these safeguards remains to be seen. As with the Patriot intelligence exception,¹⁹⁹ there is no requirement that prosecutors identify individual recipients of grand jury materials to the court overseeing the grand jury. Prosecutors need only file a notice with the court indicating that the information was disclosed and identifying the entity receiving the materials.²⁰⁰ Furthermore,

substantial step in that direction.

The change made to section 6501 previously was enacted by the Homeland Security Act, but that change never went into effect because the Federal Rule of Criminal Procedure amended by the HSA was revised by the Supreme Court shortly after the enactment of the HSA, and the amendment made by HSA presupposed the earlier text of the Federal rule. The same provisions were introduced as part of S. 2599 by Senators CHAMBLISS and me on June 24, 2004.

150 CONG. REC. S11,995 (daily ed. Dec. 8, 2004) (ellipses and alterations in angle brackets in original).

¹⁹³ 148 CONG. REC. H3942 (daily ed. June 26, 2002) (statement of Rep. Weiner) (“I share the concerns that some raised in committee that we do not want this information to chip away at the confidentiality of the grand jury.”).

¹⁹⁴ *Id.* at H3939 (statement of Rep. Sensenbrenner) (noting that “[t]he information may only be disclosed for the specified purpose of preventing and responding to a threat. Additionally, recipients may only use the disclosed information in the conduct of their official duties as is necessary, and they are subject to the restrictions for unauthorized disclosures, including contempt of court”).

¹⁹⁵ FED. R. CRIM. P. 6(e)(3)(D)(i).

¹⁹⁶ FED. R. CRIM. P. 6(e)(3)(D).

¹⁹⁷ FED. R. CRIM. P. 6(e)(3)(D)(i).

¹⁹⁸ FED. R. CRIM. P. 6(e)(7).

¹⁹⁹ See *supra* note 111 and accompanying text.

²⁰⁰ FED. R. CRIM. P. 6(e)(3)(D)(ii).

with the exception of the contempt sanction created for violations of the joint guidelines discussed above,²⁰¹ Congress again failed to expressly grant the judiciary the power to impose contempt sanctions.²⁰² How a court might be expected to impose sanctions for contempt without knowing the identity of the person or persons to whom disclosure was made is a mystery.

c. The Future of Rule 6(e)

In a period of little over three years, Congress has fundamentally altered a doctrine of grand jury secrecy that has been revered and protected for centuries.²⁰³ It did so in a time of national crisis and without the notice and comment traditionally accompanying changes to the rules of procedure.²⁰⁴ Now is an opportune time for Congress to reflect on the changes it has wrought. As it considers whether other measures enacted under the Patriot Act should be reauthorized, it would be prudent for Congress to revisit the post-September 11th amendments and reevaluate both their constitutionality and their impact upon the functioning of the grand jury.

II. GRAND JURY SECRECY AND THE FIFTH AMENDMENT

The Grand Jury Clause of the Fifth Amendment to the United States Constitution guarantees that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.”²⁰⁵ The parameters of this right, however, have yet to be fully defined. In particular, the United States Supreme Court has never directly ruled on whether the right to secrecy of grand jury proceedings is implicit in a person’s right to indictment by a grand jury. The examination of whether Congress should rethink the recent amendments to Rule 6(e) begins

²⁰¹ See *supra* notes 197–98 and accompanying text.

²⁰² Again, the courts may possess the inherent power to impose this sanction. See *Blalock v. United States*, 844 F.2d 1546, 1553 (11th Cir. 1988); see also *United States v. Hoffa*, 349 F.2d 20, 20 (6th Cir. 1965); *United States v. Schiavo*, 375 F. Supp. 475, 478 (E.D. Pa. 1974); *United States v. Smyth*, 104 F. Supp. 283, 309 n.40 (N.D. Cal. 1952); 4 DRAFTING HISTORY, *supra* note 41, at 20.

²⁰³ See discussion *supra* Part I.A & B.

²⁰⁴ See Michael Fitzpatrick, *Code Orange: Will It Be Used To “End-Run” Federal Rulemaking Requirements?*, 29 ADMIN. & REG. L. NEWS 11 (2004). See generally FEDERAL RULEMAKING, at <http://www.uscourts.gov/rules/procedurejc.htm> (last visited Feb. 21, 2005).

²⁰⁵ U.S. CONST. amend. V.

with an analysis of whether grand jury secrecy has constitutional underpinnings. Given the magnitude of their consequences, the recent amendments to Rule 6(e) should compel Congress (if not the courts) to reevaluate this thorny issue.

A. *Costello v. United States: The Final Word on Grand Jury Rights?*

In *Costello v. United States*,²⁰⁶ the Supreme Court presented its clearest statement of the rights guaranteed by the Grand Jury Clause. The defendant in that case, Frank Costello, was indicted for and ultimately convicted of willfully attempting to avoid federal income taxes.²⁰⁷ Both during and after trial, the defendant moved to dismiss the indictment on the ground that it was based solely upon hearsay evidence, thus violating the Grand Jury Clause.²⁰⁸ The United States District Court for the Southern District of New York denied his motion and the United States Court of Appeals for the Second Circuit affirmed.²⁰⁹ In upholding the lower courts' rulings, the Supreme Court concluded, "[a]n indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more."²¹⁰

Standing alone, *Costello* could be read to stand for the proposition that the right to indictment by a grand jury does not encompass the right to secrecy of grand jury proceedings.²¹¹ That is, if a grand jury is legally constituted, unbiased, and issues an indictment, the constitutional requirements are satisfied.²¹² Indeed, a few lower courts have specifically held that because the right to secrecy "was never intended as a safeguard for the interests of the accused,"²¹³ it cannot be viewed as incorporated into the Fifth Amendment rights of the accused.

²⁰⁶ 350 U.S. 359 (1956).

²⁰⁷ *Id.* at 359–61.

²⁰⁸ *Id.* at 361.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 363.

²¹¹ *See id.* at 359.

²¹² *Costello*, 350 U.S. at 363.

²¹³ *In re Grand Jury Proceedings*, 4 F. Supp. at 285; *see also* *United States v. Amazon Indus. Chem. Corp.*, 55 F.2d 254, 261 (D. Md. 1931) (concluding that "none of the reasons for [grand jury secrecy] are founded upon an inherent right in the individual who is being investigated to the same constitutional safeguards that are unquestionably his when he is brought to trial for a given crime").

B. *Midland Asphalt Corp. v. United States: Acknowledging the Role of Grand Jury Secrecy*

Treating *Costello* as the final word on the rights encompassed by the Grand Jury Clause stretches the Court's holding too far. Though *Costello* addressed the limited question of what the Grand Jury Clause requires before a person may be subjected to trial,²¹⁴ the Court's holding did not address whether the Grand Jury Clause contains other requirements that must be satisfied to avoid dismissal of an indictment. In *Midland Asphalt Corp. v. United States*,²¹⁵ the Supreme Court spoke to this critical distinction.²¹⁶ The defendants, Midland Asphalt Corporation and Albert C. Litterer, moved to dismiss the indictment against them on the grounds that the Government had violated Rule 6(e) by disclosing matters occurring before the grand jury.²¹⁷ The United States District Court for the Western District of New York denied the motion.²¹⁸ The Second Circuit Court of Appeals dismissed the defendants' appeal on the grounds that *Rule 6(e)*'s function is to "protect society's interest in keeping secret the identity of grand jury witnesses and persons under investigation."²¹⁹ In affirming the Second Circuit's decision, the Supreme Court stated, "[t]here is a 'crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'"²²⁰

Consistent with *Costello*, the Court noted that "a right not to be tried" exists "when there is no grand jury indictment."²²¹ The Court went on to hold that "[o]nly a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried."²²² The "isolated breach of the traditional secrecy requirements" by the Government was deemed insufficient to satisfy either of these requirements.²²³ Nonetheless, the Court's ruling in *Midland Asphalt* left open the possibility that violations of the secrecy

²¹⁴ *Costello*, 350 U.S. at 363.

²¹⁵ 489 U.S. 794 (1989).

²¹⁶ *Id.* at 800–02.

²¹⁷ *Id.* at 796.

²¹⁸ *Id.*

²¹⁹ *Id.* at 797 (alteration and internal quotation marks omitted).

²²⁰ *Id.* at 801 (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982)).

²²¹ *Midland Asphalt*, 489 U.S. at 802.

²²² *Id.* at 802.

²²³ *Id.*

requirements incorporated into Rule 6(e) might provide the basis for a reversal of a conviction on appeal.²²⁴

Perhaps most importantly, the Court clarified the protections afforded by the Grand Jury Clause, acknowledging that “[u]ndoubtedly the common-law protections traditionally associated with the grand jury attach to the grand jury required by this provision [the Grand Jury Clause]—including the requisite secrecy of grand jury proceedings.”²²⁵ Essentially, the Court indicated that defendants have a Fifth Amendment right to be indicted by a grand jury that functions under the traditional, common-law rules of secrecy.²²⁶ Given that the Supreme Court has “consistently . . . recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings,”²²⁷ such a rule would make sense.

C. *Exploring the Interests Protected by Grand Jury Secrecy*

Grasping the constitutional underpinnings of the right to secrecy is impossible without first understanding the grand jury’s function. The grand jury’s “establishment in the Constitution ‘as the sole method for preferring charges in serious criminal cases’ indeed ‘shows the high place it [holds] as an instrument of justice.’”²²⁸ In recent years, the Supreme Court has stressed that the grand jury serves “the ‘dual function of determining if there is probable cause to believe that a crime has been committed *and* of protecting citizens

²²⁴ *Id.* at 800. Additionally, the Court left open the possibility that in an extreme circumstance, a violation of grand jury secrecy could give rise to the right not to be tried. *Id.* at 802. Although the Court found that an “isolated breach of the traditional secrecy requirements” did not give rise to such a right, *id.*, the Court failed to address whether a pattern of such breaches might do so. *See id.*

²²⁵ *Id.*

²²⁶ *Id.* at 802.

²²⁷ *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); *accord* *Butterworth v. Smith*, 494 U.S. 624, 630 (1990).

²²⁸ *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399–400 (1959) (quoting *Costello v. United States*, 350 U.S. 359, 359, 362 (1956)). In the words of Justice Harlan:

In the secrecy of the investigations by grand juries, the weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor—have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies.

Hurtado v. California, 110 U.S. 516, 554–55 (1884) (Harlan, J., dissenting).

against unfounded criminal prosecutions.”²²⁹ “The . . . concern for the grand jury’s dual function underlies the ‘long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts.’”²³⁰

The Supreme Court has recognized four distinct interests protected by the right to secrecy in grand jury proceedings.²³¹ First, “if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony.”²³² Second, “witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements.”²³³ Third, the risk would exist “that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment.”²³⁴ Fourth, “by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.”²³⁵

Clearly, not all of these interests implicate a defendant’s constitutional rights.²³⁶ But the first two interests go to the very heart of the grand jury function of shielding the innocent from prosecution. The system cannot work without witnesses who “feel free to speak the truth without reserve.”²³⁷ The “cloak of silence” covering grand jury proceedings was born in part of “the desire to create a sanctuary, inviolate to *any* intrusion except on proof of some special and overriding need, where a witness may testify, free and

²²⁹ *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 423 (1983) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 686–87 (1972)) (emphasis added); *see supra* notes 13–19 and accompanying text for a discussion of the grand jury’s historical purpose, which recognized a dual function.

²³⁰ *Sells Eng’g*, 463 U.S. at 424 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958)); *accord Costello*, 350 U.S. at 362 (“The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor.”). Traditionally, the English grand jury “act[ed] in secret.” *Id.*

²³¹ *Sells Eng’g*, 463 U.S. at 424; *Douglas Oil Co.*, 441 U.S. at 218.

²³² *Douglas Oil Co.*, 441 U.S. at 219.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ The third, for example, relates to the public’s interest in determining whether probable cause exists to believe a crime has been committed.

²³⁷ *Goodman v. United States*, 108 F.2d 516, 519 (9th Cir. 1939).

unfettered by fear of retaliation.”²³⁸

It is not unreasonable to question why special protection of grand jury witnesses is warranted. Today’s grand jury witness may be tomorrow’s trial witness and, therefore, possibly subject to public questioning. Of course, not every grand jury proceeding results in an indictment and not every indictment results in a trial.²³⁹ Likewise, every trial does not require testimony from every grand jury witness. In fact, it is far from certain that any given grand jury witness will ever be asked to testify at trial.

More importantly, the difference in circumstances between an appearance at trial and one before the grand jury may also justify greater protection.²⁴⁰ Grand jury witnesses, who may be subjected to intense questioning or even browbeating by prosecutors, appear unprotected by counsel.²⁴¹ Prosecutors are allowed to “go fishing” and seek evidence, such as hearsay, that would be inadmissible at trial.²⁴²

“Grand jury secrecy . . . ‘is as important for the protection of the innocent as for the pursuit of the guilty.’”²⁴³ If potential but unknown witnesses are concerned that their grand jury testimony will be not be protected, they may remain in the shadows. If known witnesses fear for their safety or that of friends or family, they may offer incomplete or inaccurate testimony.²⁴⁴ Any time less than the whole story is told,

²³⁸ Texas v. U.S. Steel Corp., 546 F.2d 626, 629 (5th Cir. 1977) (footnote omitted).

²³⁹ For example, in fiscal year 1999 only six percent of all federal criminal prosecutions were disposed of by trial. EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS ANNUAL STATISTICAL REPORT 14 (2000).

²⁴⁰ Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339, 354 (1999) (“These circumstances might well combine to make a grand jury witness more vulnerable to injury, and more deserving of protection . . .”).

²⁴¹ Illinois v. F.E. Moran, Inc., 740 F.2d 533, 540 (7th Cir. 1984). A grand jury witness does not have the right to have counsel present during questioning. *In re* Petition of Groban, 352 U.S. 330, 333 (1957). In essence, the scope of the questioning is left to the prosecutor’s discretion. *See id.* at 333–34.

²⁴² Costello v. United States, 350 U.S. 359, 361–64 (1956).

²⁴³ United States v. Sells Eng’g, Inc., 463 U.S. 418, 424 (1983) (quoting United States v. Johnson, 319 U.S. 503, 513 (1943)). *But see In re Grand Jury Proceedings*, 4 F. Supp. 283, 284–85 (E.D. Pa. 1933) (“The rule of secrecy . . . was designed for the protection of the witnesses who appear and for the purpose of allowing a wider and freer scope to the grand jury itself, and was never intended as a safeguard for the interests of the accused or of any third person.”).

²⁴⁴ Douglas Oil Co. of Cal. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979) (recognizing that publicizing preindictment proceedings would both deter witnesses from coming forward and inhibit witnesses who did appear from testifying “fully and

an innocent person may stand accused.²⁴⁵ The Grand Jury Clause mandates a real grand jury with all of its protections, not a grand jury in name only.

Like termites undermining the structure of a building, repeated breaches of grand jury secrecy systemically injure the entire grand jury process. Ultimately, the cumulative effect of disclosures denies grand jury targets their Fifth Amendment right to a meaningful review by the grand jury. Arguably, this is why courts and rulemakers have been reluctant to recognize exceptions to the grand jury secrecy rule and to grant disclosure pursuant to those exceptions.²⁴⁶ If the exceptions are permitted to swallow the rule, the entire grand jury process suffers.

To illustrate, if the testimony of a grand jury witness in Case A is disclosed, no injury may result to the target in Case A. Although the disclosure may have no impact whatsoever on the proceedings involving this particular target, it does not follow that the disclosure is not harmful. Over time, after more and more disclosures, the public becomes aware of the consequences, which has a chilling effect.²⁴⁷ For example, fearing retribution of some sort, a witness in Case X fails to step forward with information about the identity of the true

frankly”); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959) (noting that “testimony would be parsimonious if each witness knew that his testimony would soon be in the hands of the accused”).

²⁴⁵ In the words of Justice Harlan:

In the secrecy of the investigations by grand juries, the weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor—have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies. “Grand juries perform,” says [Justice] Story, ‘most important public functions, and are a great security to the citizens against vindictive prosecutions, either by the government or by political partisans, or by private enemies.’

Hurtado v. California, 110 U.S. 516, 554–55 (1884) (Harlan, J., dissenting) (citation omitted).

²⁴⁶ See generally *supra* Part I.

²⁴⁷ Though I am not suggesting that the right of grand jury secrecy is based on the First Amendment, the threat of governmental action may function as a deterrent to speech. To illustrate, the Supreme Court has long recognized that the threat of the loss of a financial benefit, such as a job or a contract, “in retaliation for speech may chill speech on matters of public concern.” *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996). The danger that grand jury witnesses’ testimony could be disclosed to third parties who would harm them may deter witnesses from speaking truthfully.

perpetrator of the crime and another witness tells the grand jury less than the whole story or, even worse, lies. As a result, the target in Case X becomes the victim of a grand jury system weakened by secrecy breaches.

D. Understanding the Dearth of Supreme Court Authority

The dearth of Supreme Court authority directly addressing the existence of a constitutional right of grand jury secrecy can be explained by the types of cases the Court has heard. Some cases simply have not implicated secrecy interests relating to the constitutional rights of defendants. *Pittsburgh Plate Glass Co. v. United States*²⁴⁸ and *Dennis v. United States*²⁴⁹ involved motions in which the accused sought to obtain grand jury materials. Given that any constitutional right to secrecy arises only from the Grand Jury Clause and this clause creates rights belonging to the accused (not the Government), these rights would not ordinarily come into play in a case in which the accused sought disclosure.²⁵⁰ In other cases, the Court was able to reach a finding that disclosure was not permitted under Rule 6(e).²⁵¹ Accordingly, there was no need to examine any constitutional requirements.

In the last fifty years, the Supreme Court has ordered disclosure pursuant to Rule 6(e) in only one case. In *United States v. John Doe, Inc. I*,²⁵² prior to filing a civil action, attorneys in the Justice Department's Antitrust Division²⁵³ needed to consult with the United States Attorney for the Southern District of New York and six attorneys within the Civil Division.²⁵⁴ The Justice Department officials

²⁴⁸ 360 U.S. 395 (1959).

²⁴⁹ 384 U.S. 855 (1966).

²⁵⁰ Of course, even in the absence of any constitutional protection, the Court may, in interpreting Rule 6(e), consider the "long-established policy of secrecy." *Pittsburgh Plate Glass Co.*, 360 U.S. at 399 (internal quotation marks omitted).

²⁵¹ See *United States v. Baggot*, 463 U.S. 476, 480 (1983) (holding that disclosure of grand jury materials to IRS to allow it to determine tax liability was not permitted under Rule 6(e)); *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 568 (1983) (finding that disclosure of grand jury materials to state attorney general without court approval and showing of particularized need would not comport with Rule 6(e) requirements); *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (concluding that defendants in civil antitrust action were not entitled to discovery of grand jury transcript in Government's possession).

²⁵² 481 U.S. 102 (1987).

²⁵³ The case involved a potential claim under the False Claims Act. Typically, the Civil Division handled such claims. *Id.* at 105.

²⁵⁴ *Id.* at 104–05.

requested permission to disclose grand jury materials.²⁵⁵ The United States District Court for the Southern District of New York found that, because the Justice Department showed “a particularized need for disclosure,” the requirements of then-Rule 6(e)(3)(C)(i) were satisfied.²⁵⁶ The Second Circuit Court of Appeals, finding the disclosure “unnecessary,” reversed.²⁵⁷ After reviewing the record, the Supreme Court concluded that the district court correctly applied the “particularized need” standard and did not abuse its discretion in allowing disclosure.²⁵⁸

The *John Doe* case provided the Court with perhaps its best opportunity to examine the relationship between the right of grand jury secrecy and the right to a grand jury as created by the Grand Jury Clause. Still, even this case did not require the Court to do so. The case involved the application of former Rule 6(e)(3)(C)(i),²⁵⁹ which required a court order to obtain discovery²⁶⁰ as well as “a strong showing of particularized need’ before disclosure is permitted.”²⁶¹ Even if the Court were to have expressly recognized the constitutional underpinnings of the right to secrecy, the test it applied would have likely been the same.²⁶² Indeed, in applying the test, the Court specifically examined whether the disclosure would seriously threaten the recognized secrecy interests.²⁶³

Partly because the need has never arisen, the Supreme Court has not yet directly addressed the constitutional underpinnings of the doctrine of grand jury secrecy. The common-law and the pre-September 11th version of Rule 6(e) provided safeguards equivalent to those required under the Fifth Amendment.²⁶⁴ If presented with the question, the Supreme Court should rule that a material breach of the traditional protection afforded grand jury secrecy is unconstitutional. To rule otherwise would strip the right to indictment by a grand jury of much of its meaning.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 111.

²⁵⁸ *John Doe*, 481 U.S. at 116–17.

²⁵⁹ FED. R. CRIM. P. 6(e)(3)(C)(i) (2000) (amended 2001) (currently at FED. R. CRIM. P. 6(e)(3)(E)(i)); see *supra* note 81.

²⁶⁰ *John Doe*, 481 U.S. at 111.

²⁶¹ *Id.* at 112 (quoting *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 443–45 (1983)).

²⁶² See *infra* Part II.E.

²⁶³ *John Doe*, 481 U.S. at 113–15.

²⁶⁴ See *infra* text accompanying notes 269–80, 298–303.

E. *Examining the Parameters of Grand Jury Secrecy*

Although the Supreme Court should recognize a Fifth Amendment right of grand jury secrecy, that right should not be absolute.²⁶⁵ The common-law protections attaching to the grand jury as required by the Fifth Amendment have always allowed for disclosure under certain circumstances.²⁶⁶ To determine the test for the constitutionality of a disclosure, one must scrutinize these protections, both as articulated by the courts and as codified in Rule 6(e). A review of the existing authorities indicates that for the disclosure of grand jury materials to comport with the Fifth Amendment, two criteria must be satisfied. First, a “compelling necessity” for the disclosure must be established.²⁶⁷ Second, barring extraordinary circumstances, disclosure must be judicially supervised.²⁶⁸

1. The Requirement of Compelling Necessity

The Supreme Court’s decision in *United States v. Procter & Gamble Co.*²⁶⁹ provides an excellent starting point for examining the common-law protections:

The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow. This “indispensable secrecy of grand jury proceedings,” must not be broken except where there is a compelling necessity. There are instances when that need will outweigh the countervailing policy. But they must be

²⁶⁵ For example, see *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1, Miami*, 833 F.2d 1438 (11th Cir. 1987), where the Court of Appeals for the Eleventh Circuit stated:

[t]he policy of grand jury secrecy, whether viewed as a deeply-rooted tradition of the common law or as itself implicit in the Fifth Amendment guarantee of indictment for “infamous crime,” is nonetheless a generalized one. The balancing that must take place is between the specific need of the Committee for material necessary to its constitutionally empowered task of impeachment in *this* case versus the specific secrecy interests that remain in *these* grand jury materials.

Id. at 1443.

²⁶⁶ See *supra* notes 29–66 and accompanying text.

²⁶⁷ See *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 218 (1979); see also *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

²⁶⁸ See *supra* notes 37–38, 42, 72 & 89 and accompanying text.

²⁶⁹ 356 U.S. 677 (1958).

shown with particularity.²⁷⁰

Procter & Gamble holds that a person seeking disclosure of grand jury materials bears the burden of establishing a “compelling necessity” for the disclosure.²⁷¹ Such a requirement is entirely consistent with the common law reflected in pre-September 11th Rule 6(e).²⁷² The analysis of whether a compelling necessity exists requires the application of a two-pronged test.²⁷³ Historically, matters occurring before a federal grand jury have been subject to disclosure in only a handful of circumstances: to serve the grand jury;²⁷⁴ to protect defendants against prosecutorial misconduct;²⁷⁵ to further the ends of justice in a judicial proceeding;²⁷⁶ and to assist state and Indian tribal officials in the prosecution of state and Indian tribal crimes.²⁷⁷ In each of these circumstances, disclosure may be required to protect an important societal interest. Not every category of need is sufficient to outweigh the policy of protecting grand jury materials.²⁷⁸ Thus, a person seeking disclosure must first establish that his or her need is of the right kind.²⁷⁹ But merely establishing that a request falls within one of the recognized categories does not

²⁷⁰ *Id.* at 682 (citation omitted).

²⁷¹ *Id.*

²⁷² See discussion *supra* Part I.B.

²⁷³ See *United States v. Baggot*, 463 U.S. 476, 480 (1983).

²⁷⁴ See FED. R. CRIM. P. 6(e)(3)(A) (allowing disclosure to “an attorney for the government for use in performing that attorney’s duty” and to “any government personnel . . . that an attorney for the government considers necessary to assist in performing that attorney’s duty to enforce federal criminal law”); FED. R. CRIM. P. 6(e)(3)(C) (“An attorney for the government may disclose any grand jury matter to another federal grand jury.”); *supra* notes 53–65 and accompanying text.

²⁷⁵ For examples of courts denying disclosure requests from defendants before grand juries see *supra* note 31 and cases cited therein. See also FED. R. CRIM. P. 6(e)(3)(E)(ii) (allowing disclosure when authorized by court “at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury”).

²⁷⁶ See *supra* notes 32–33, 82–87 and accompanying text; see also FED. R. CRIM. P. 6(e)(3)(E)(i) (allowing disclosure when authorized by court “preliminarily to or in connection with a judicial proceeding”).

²⁷⁷ See FED. R. CRIM. P. 6(e)(3)(E)(iv) (allowing disclosure “at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law”).

²⁷⁸ *Baggot*, 436 U.S. at 480 (holding that “not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy”).

²⁷⁹ *Id.*

suffice to establish that disclosure is appropriate. A person seeking disclosure must prove that he or she possesses a particularized need for disclosure in the case at bar.²⁸⁰

Principally, the courts have said that the need for the grand jury materials must be real. "The particularized need test is a criterion of *degree . . .*,"²⁸¹ For example, both private parties and governmental officials²⁸² seeking grand jury materials for use in another judicial proceeding "must show the material they seek is needed to avoid a possible injustice in [the] . . . judicial proceeding, that the need for disclosure is greater than the need for secrecy, and that the request is structured to cover only material so needed."²⁸³ Satisfying this burden is not easy. To overcome the need for secrecy, the party seeking disclosure must establish that nondisclosure would result in great prejudice.²⁸⁴ Simply demonstrating that the grand jury materials sought are "relevant" is insufficient.²⁸⁵ In determining whether disclosure is necessary, a court may weigh the likelihood that the information could be obtained through other means.²⁸⁶

Nonetheless, because it involves balancing interests, the "particularized need" standard has always offered some elasticity.²⁸⁷ By its very nature, the standard requires that the facts be considered on a case-by-case basis. To illustrate, a "court might reasonably consider that disclosure to Justice Department attorneys poses less risk of further leakage . . . than would disclosure to private parties or the general public."²⁸⁸ Additionally, "under the particularized need standard, the district court may weigh the public interest, if any, served by disclosure to a governmental body"²⁸⁹

The sole exception to the requirement of a showing of particularized need arises when a prosecutor seeks to disclose information either to other government attorneys involved in federal criminal investigations,²⁹⁰ to government personnel assisting

²⁸⁰ See *supra* notes 35–36, 82–87 and accompanying text.

²⁸¹ *Baggot*, 463 U.S. at 480.

²⁸² See *supra* notes 82–87 and accompanying text.

²⁸³ *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979).

²⁸⁴ See *id.* at 221.

²⁸⁵ *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 444 (1983).

²⁸⁶ *Id.* at 445.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 567 n.15 (1983).

²⁹⁰ See *supra* notes 53–54 and accompanying text.

government attorneys in such investigations,²⁹¹ or to federal grand jurors.²⁹² In the sense that it involves “revealing such information to other persons,” sharing information with members of these groups falls within the definition of disclosure.²⁹³ Nevertheless, in this case, sharing does not involve a revelation to a person not intimately involved in the functioning of the grand jury. Two of the three groups, government attorneys and grand jurors, have the right to be present in the grand jury room.²⁹⁴ The third group, government personnel assisting government attorneys, is in some ways akin to a group that has long had access to the grand jury room, court stenographers.²⁹⁵ Like the stenographer, the FBI agent charged with gathering evidence serves as the handmaid of the grand jury. Furthermore, since persons within these groups may use the information disclosed only for limited purposes, such as to further a grand jury investigation,²⁹⁶ absent a belief that a need exists for their assistance, there is no logical reason for a prosecutor to disclose the information. In short, a particularized need must exist or there would be no disclosure. The circumstances surrounding this exception are truly unique.

A finding of compelling necessity is clearly required for disclosure to comport with the requirements of the Grand Jury Clause of the Fifth Amendment.²⁹⁷ The question then becomes who is responsible for making such a finding.

2. The Need for Judicial Review

The decision to disclose grand jury materials has historically been in the hands of the judiciary, rather than the prosecutor.²⁹⁸ To understand why, one must consider the exceptional status of the

²⁹¹ See *supra* notes 55–62 and accompanying text.

²⁹² See *supra* notes 63–64 and accompanying text.

²⁹³ *United States v. John Doe, Inc. I*, 481 U.S. 102, 108 (1987).

²⁹⁴ FED. R. CRIM. P. 6(d)(1).

²⁹⁵ *Id.*

²⁹⁶ FED. R. CRIM. P. 6(e)(3)(B) (“A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney’s duty to enforce federal criminal law.”)

²⁹⁷ See *supra* notes 269–96 and accompanying text.

²⁹⁸ See *supra* notes 37, 42, 88–89 and accompanying text; see also *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 567 (1983) (“There is only one exception to the general prohibition against disclosure without prior court approval, but that exception is limited to Federal Government personnel performing a specified federal law enforcement function.”).

grand jury. “[T]he grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It “is a constitutional fixture in its own right.”²⁹⁹

Grand jury independence is fragile. It depends on a delicate balance of judicial and prosecutorial oversight. “A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court’s aid, because powerless itself to compel the testimony of witnesses.”³⁰⁰ A grand jury cannot indict without the consent of the prosecutor.³⁰¹ Thus, if the grand jury is an appendage of the court, it is also then an appendage of the prosecutor. The Fifth Amendment’s “constitutional guarantee [of the right to indictment by a grand jury] presupposes an investigative body ‘acting independently of either prosecuting attorney or judge . . .’”³⁰² It is the fact that judge and prosecutor must share control that guarantees the grand jury’s independence. This requirement of judicial involvement is entirely consistent with the common law reflected in pre-September 11th Rule 6(e).³⁰³

The function of the grand jury is to serve as a shield against prosecutorial abuse,³⁰⁴ not as a prosecutor’s private tool. As Lord Acton famously put it, “absolute power corrupts absolutely.”³⁰⁵ The involvement of the courts serves as a check on any abuse of power. For example, acting under the auspices of a court, a prosecutor may subpoena a witness or a record on the grand jury’s behalf.³⁰⁶ Nonetheless, the court retains the right to “quash or modify a subpoena on motion if compliance would be ‘unreasonable or oppressive.’”³⁰⁷

²⁹⁹ *United States v. Williams*, 504 U.S. 36, 47 (1992) (quoting *Nixon v. Sirica*, 487 F.2d 700, 712 n.54 (D.C. Cir. 1973)) (intermediate citation omitted).

³⁰⁰ *Brown v. United States*, 359 U.S. 41, 49 (1959), *overruled in part by* *Harris v. United States*, 382 U.S. 162 (1965).

³⁰¹ *In re Grand Jury Proceedings*, Special Grand Jury 89-2, 813 F. Supp. 1451, 1461 (D. Colo. 1992).

³⁰² *United States v. Dionisio*, 410 U.S. 1, 16 (1973) (quoting *Stirone v. United States*, 361 U.S. 212, 218 (1960)).

³⁰³ *See supra* Part I.B.

³⁰⁴ *See supra* notes 13–19 and accompanying text.

³⁰⁵ THE NEW DICTIONARY OF CULTURAL LITERACY 647 (E.D. Hirsch et al. eds., 3d ed. 2002).

³⁰⁶ *See* FED. R. CRIM. P. 17.

³⁰⁷ *United States v. Calandra*, 414 U.S. 338, 346 n.4 (1974) (quoting FED. R. CRIM.

In the context of disclosures, it only makes sense that the courts be given the power to decide when the veil of secrecy may be lifted. Grand juries derive their subpoena power from the courts.³⁰⁸ While broad, this power is not unlimited.³⁰⁹ By design, grand juries may exercise this power to obtain evidence relating to whether there is probable cause that a crime has been committed.³¹⁰ They may not exercise this power for other purposes.³¹¹ “In short, if grand juries are to be granted extraordinary powers of investigation because of the difficulty and importance of their task, the use of those powers ought to be limited as far as reasonably possible to the accomplishment of the task.”³¹² When information obtained via a grand jury subpoena is sought for a purpose other than that for which it was intended (i.e., when disclosure is sought), the ultimate source of the subpoena power, the court, should be the final arbiter. Otherwise, the grand jury becomes the prosecutor’s tool and the potential for misuse is substantial.³¹³

The court is also the body best suited to undertake the balancing of interests required to determine whether disclosure is warranted. “A court of law . . . is the sole means of protecting individual privacy from the airing of private judgment unguided by standards of due process.”³¹⁴ If decision making were left in the hands of prosecutors, there would be no hearing, no presentation of evidence, no record, no guiding precedent, and no possibility of appeal. Most importantly, there would be no neutral decision maker. Weighing the various interests involved when disclosure of grand jury materials is at issue is a delicate task.³¹⁵ Accordingly, the decision to remove the veil of grand jury secrecy should not be made on an *ad hoc* basis.

Again, the sole exception to the requirement that disclosure be subject to judicial approval arises when a prosecutor seeks to disclose information to other government attorneys involved in federal criminal investigations, government personnel assisting government

P. 17(c)).

³⁰⁸ *Brown v. United States*, 359 U.S. 41, 49 (1959), *overruled in part by* *Harris v. United States*, 382 U.S. 162 (1965).

³⁰⁹ *United States v. R. Enters., Inc.*, 498 U.S. 292, 299 (1991).

³¹⁰ *Id.* at 297.

³¹¹ *See, e.g., id.* at 299.

³¹² *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 434–35 (1983).

³¹³ *Id.* at 432–33.

³¹⁴ *In re Grand Jury Proceedings*, Special Grand Jury 89-2, 813 F. Supp. 1451, 1458 (D. Colo. 1992).

³¹⁵ *Schmidt v. United States*, 115 F.2d 394, 397 (6th Cir. 1940).

attorneys in such investigations, or federal grand jurors.³¹⁶ As discussed above, the circumstances giving rise to this exception are unique.³¹⁷ A prosecutor is the best judge of the amount and type of investigative support needed to conduct a grand jury investigation. Additionally, “interlocutory appeal of issues disruptive of a grand jury investigation are not favored.”³¹⁸ The sheer number of such requests would be likely to overwhelm the system. Based on the foregoing, to comport with the Fifth Amendment right of grand jury secrecy, the disclosure of grand jury materials must be the result of a compelling necessity and must be judicially approved.

III. RULE 6(E), THE CONSTITUTION, AND SOUND PUBLIC POLICY

The exceptions to the doctrine of grand jury secrecy created by the Patriot Act and the Intelligence Reform and Terrorism Prevention Act fundamentally differ from the traditional exceptions.³¹⁹ Congress, reacting viscerally to catastrophic events, enacted these permanent additions to the legal landscape in haste and buried them deep within cumbersome bills. The 340-plus-page Patriot Act was conceived, written, and enacted within six weeks of the attacks of September 11th.³²⁰ Few legislators voiced dissent, perhaps out of fear for being labeled unpatriotic.³²¹ The typical committee hearings and debates surrounding legislation of this scope (or any scope for that matter) were absent.³²² Rarely do passionate

³¹⁶ See *supra* notes 53–64 and accompanying text.

³¹⁷ See *supra* text accompanying notes 290–96.

³¹⁸ S. REP. NO. 95-354, at 7 n.12 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 531; cf. *Cobbledick v. United States*, 309 U.S. 323, 327 (1940) (“The duration of its (the grand jury’s) life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found.”) (internal quotation marks omitted).

³¹⁹ See *supra* notes 97–135, 172–80 and accompanying text.

³²⁰ The Patriot Act was introduced to the Senate on October 4, 2001, S. 1510, 107th Cong. (2001), 147 CONG. REC. S10,285 (daily ed. Oct. 4, 2001), and signed into law by President George W. Bush on October 26, 2001, as Pub. L. No. 107-56, 115 Stat. 272 (2001).

³²¹ The House passed the measure by a vote of 357 to 66, and the Senate passed it by a vote of 98 to 1. Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145, 1177–78 (2004).

³²² See generally Emmanuel Gross, *The Influence of Terrorist Attacks on Human Rights in the United States: The Aftermath of September 11, 2001*, 28 N.C. J. INT’L L. & COM. REG. 1, 3 (2002) (“Congress took action without a proper debate on the Patriot Act’s ramifications and without providing the American public with an opportunity to voice its opinion, despite the enormous impact of the Patriot Act on the daily lives of

reactions produce good law.³²³ If Congress intends to permanently alter the grand jury system that is older than our nation itself, it should do so thoughtfully and with great care.

During times of turmoil, the rights enshrined in our Constitution face their greatest threat.³²⁴ “In such periods the times seem so different, so out of joint, the threats from within or without seem so unprecedented, that the Constitution itself is perceived by many persons as anachronistic, or at least rigidly, unrealistically formalistic.”³²⁵ Congress must be ever aware of the dangers of allowing momentary fears to drive public policy.

With this danger in mind, Congress should take the opportunity to review and repair any damage inflicted by the recent amendments, and should examine the Patriot intelligence exception and the terrorism prevention exception under the lens of the Constitution and with an eye to sound public policy.

A. *The Patriot Intelligence Exception*

A careful study of the Patriot intelligence exception reveals that its application results in disclosures causing systemic injury to the grand jury process. As written and applied, the exception violates the

all American citizens.”).

³²³ One need only ponder the internment and exclusion of Japanese-Americans during World War II to grasp the sometimes unthinkable misjudgments of leaders and citizens alike in wartime. See generally *Korematsu v. United States*, 323 U.S. 214 (1944). Almost half a century later, Congress specifically recognized that:

as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

Restitution for World War II Internment of Japanese-Americans and Aleuts, Pub. L. No. 100-383, 102 Stat. 903 (1988) (codified at 50 U.S.C. app. § 1989a(a) (2000)).

³²⁴ See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 456–57 (1985).

³²⁵ *Id.*

Grand Jury Clause of the Fifth Amendment.³²⁶ Even if the constitutional problems are ignored, sound public policy reasons exist for reworking this exception.³²⁷

1. The Fifth Amendment Analysis

To satisfy the Fifth Amendment, any disclosure must be justified by a compelling necessity and must be judicially supervised.³²⁸ The Patriot intelligence exception sanctions disclosures that satisfy neither criterion. The exception permits a prosecutor to disclose “any grand jury matter involving foreign intelligence, counterintelligence . . . or foreign intelligence information . . . to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official’s duties.”³²⁹

Under the two-pronged compelling necessity test, the disclosure sought must be of a kind that serves an important societal interest.³³⁰ Additionally, the need for disclosure must be shown with particularity.³³¹ Undoubtedly, the Patriot intelligence exception satisfies the first prong of this test. Disclosure for purposes of promoting national security has never been included among the recognized categories of disclosure. Society’s interest in protecting itself against hostile acts, such as terrorism and sabotage, however, can hardly be less significant than its interest in the enforcement of public or private rights in a civil action, a long-recognized category of disclosure.³³² Few would argue that if grand jury testimony uncovers a legitimate threat to national security, it should not be revealed to the proper authorities.

The Patriot intelligence exception, however, fails to satisfy the second prong of the test. Notably, the exception does not require persons seeking disclosure to show a particularized need. Adopting the broadest possible terms, under this exception, disclosure is not limited to instances in which the United States is faced with some sort

³²⁶ See discussion *infra* Part III.A.1.

³²⁷ See discussion *infra* Part III.A.2.

³²⁸ See *supra* Part II.E.

³²⁹ FED. R. CRIM. P. 6(e)(3)(D); see also *supra* notes 97–135 and accompanying text (discussing amending Rule 6(e)).

³³⁰ See *supra* text accompanying notes 269–97.

³³¹ See *supra* text accompanying notes 280–96.

³³² See, e.g., *In re Grand Jury Proceedings*, 4 F. Supp. 283, 283–85 (E.D. Pa. 1933).

of threat, immediate or otherwise.³³³ To illustrate, under the definition of “foreign intelligence” incorporated into the exception,³³⁴ a prosecutor would be permitted to report a foreign student’s membership in a particular mosque to the FBI or the CIA.³³⁵ Alarming, the exception does not require any evidence of wrongdoing.³³⁶ Regardless of whether federal officials have a need for the information, if you happen to be a non-United States citizen, any of your activities may be reported.

It is not simply the language of the Patriot intelligence exception that is troubling. None of the pre-September 11th exceptions in Rule 6(e) expressly require a showing of particularized need.³³⁷ But the more troubling aspect of this exception is the manner in which it has been interpreted. The interpretation of this exception by the Department of Justice as reflected in the information-sharing guidelines promulgated by the Attorney General supports the idea that a showing of “particularized need” is not required.³³⁸ In fact, the guidelines make disclosure mandatory.³³⁹ If information falls within the categories described in Rule 6(e), it “*shall* be shared.”³⁴⁰ In the long history of the doctrine of grand jury secrecy, no exception has ever been used to mandate disclosure.

The vast number of disclosures mandated by the guidelines is unprecedented. To illustrate, as discussed above,³⁴¹ the broad definition of “foreign intelligence” covers every act by a foreign citizen, here or abroad. If the mandate provided by the guidelines is to be followed to the letter, a prosecutor would be charged with reporting a noncitizen’s trip to the grocery store for milk and bread. As directed by Congress,³⁴² the Justice Department is creating a

³³³ See FED. R. CRIM. P. 6(e)(3)(D).

³³⁴ *Id.*

³³⁵ The term “foreign intelligence” includes “information relating to the . . . activities of . . . foreign persons,” 50 U.S.C. § 401a(2) (2000 & Supp. I 2001); see *supra* note 100 and accompanying text. A foreign student’s act of joining a mosque could be an “activity” of a “foreign person.”

³³⁶ See 50 U.S.C. § 401a(2).

³³⁷ See *supra* Part I.B.

³³⁸ See *supra* notes 116–24 and accompanying text.

³³⁹ Ashcroft Memorandum I, *supra* note 117, Guideline 2, at 2; see also *supra* notes 118–23, 131–35 and accompanying text.

³⁴⁰ Ashcroft Memorandum I, *supra* note 117, Guideline 5, at 3 (emphasis added).

³⁴¹ See *supra* notes 100 & 335 and accompanying text.

³⁴² Congress is so concerned about foreign intelligence information being overlooked that it has mandated that the Department of Justice create a training program that helps law enforcement officials identify foreign intelligence materials

training program to help prosecutors and other law enforcement officials identify foreign intelligence information.³⁴³ There is no reason to believe, however, that the Department will ignore the language of Rule 6 and the guidelines and instruct prosecutors to more narrowly define this term.

The guidelines permit a prosecutor to petition the Attorney General for an exemption.³⁴⁴ The focus, however, appears to be on protecting criminal investigations, not on balancing the various interests involved.³⁴⁵ No one seems to be watching out for the interests of grand jury targets. A presumption of disclosure exists.³⁴⁶ Accordingly, as interpreted by the Attorney General, the Patriot intelligence exception not only permits disclosure without a showing of compelling need, it endorses such disclosure.

The Patriot intelligence exception also fails to satisfy the criterion that any disclosure be judicially supervised.³⁴⁷ The decision to disclose is completely in the hands of the Justice Department. Indeed, while the government must reveal the entity to which any information was disclosed to the court under whose authority the grand jury evidence was gathered, it need not identify the specific persons to whom the information was disclosed.³⁴⁸ The exception contains no mechanism for preventing its misuse.

The Patriot intelligence exception creates a material breach of the protection afforded grand jury secrecy by the Fifth Amendment. The failure to require a showing of particularized need and the

that must be shared. Patriot Act § 908, Pub. L. No. 107-56, 115 Stat. at 391 (codified at 28 U.S.C. § 509 note (Supp. I 2001)).

³⁴³ Ashcroft Memorandum I, *supra* note 117 Guideline 3, at 2.

³⁴⁴ *Id.* Guideline 5(c), at 4.

³⁴⁵ *Id.* Guidelines 8(b) & 9, at 5–6. The guidelines do not adequately address when an exemption is proper. Guideline 9(b) indicates that until such time as the Attorney General creates permanent exemptions from the disclosure obligation, requests will be handled by the Attorney General on a “case-by-case” basis. *Id.* Guideline 9(b), at 5. No guidance as to the criteria to be considered is provided. Guideline 9(c), however, requires a written request for exemption that among other things explains “why lesser measures such as use restrictions are not adequate.” *Id.* Guideline 9(c), at 6. Thus, exemptions will be considered using the same criteria as requests for use restrictions. Guideline 8(b) allows use restrictions when necessary “to protect sensitive law enforcement sources and ongoing criminal investigations and prosecutions.” *Id.* Guideline 8(b), at 5.

³⁴⁶ *See id.* Guideline 9(c), at 6.

³⁴⁷ *See* discussion *supra* Part II.E.2.

³⁴⁸ *See* FED. R. CRIM. P. 6(e)(3)(D)(ii). Paragraph 5 of the notice exemplar provided by the Department of Justice to Congress illustrates how vague the notice provided to the court can be. *See supra* note 155.

failure to require judicial supervision create a situation in which enormous numbers of disclosures can, have,³⁴⁹ and will be made. The cumulative effect of these disclosures will be to chill the participation of grand jury witnesses, and thereby cause systemic injury to the grand jury process.³⁵⁰

2. The Public Policy Analysis

Setting aside its constitutionality, public policy reasons strongly support amending the Patriot intelligence exception. The collective wisdom of nearly a millennium has been that secrecy is “indispensable” to grand jury proceedings.³⁵¹ “[W]hen disclosure is permitted, it is to be done ‘discretely and limitedly.’”³⁵² The Patriot intelligence exception permits disclosure that is hardly discrete and far from limited.³⁵³ This exception permits so many disclosures that it threatens to swallow the rule of secrecy. Upon closer examination, Congress will recognize that national security objectives could be met without drastically altering the grand jury system.

There can be little doubt that under some circumstances, society’s interest in national security outweighs society’s need for grand jury secrecy. But this is not always the case. Every piece of information that falls within the broad definitions of foreign intelligence or counterintelligence information is not vital (or even relevant) to national security. The Patriot intelligence exception lacks a reasonable mechanism for separating the wheat from the chafe.

The most troubling aspect of this exception is the complete absence of judicial supervision.³⁵⁴ First, it is more likely that intelligence information obtained in the course of ordinary grand jury investigations will be disclosed. Quite simply, no one is in a position to deny disclosure based on lack of relevancy or need. In fact, the Attorney General’s guidelines in effect prohibit anyone from

³⁴⁹ See *supra* notes 136–38 and accompanying text.

³⁵⁰ See *generally supra* notes 236–47 and accompanying text.

³⁵¹ *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943)); see also *supra* notes 9–28 and accompanying text, 39–46 and accompanying text, and Part II.C.

³⁵² *Dennis v. United States*, 384 U.S. 855, 869 (1966) (quoting *Procter & Gamble*, 356 U.S. at 683).

³⁵³ See *supra* text accompanying notes 103–11, 334, 341–43.

³⁵⁴ See *supra* text accompanying notes 99, 104–13, 347–50.

denying disclosure based on such considerations.³⁵⁵

Second, the lack of judicial supervision creates the temptation on the part of the Justice Department to abuse the grand jury system.³⁵⁶ Instead of using the grand jury's powers to determine whether there is probable cause that a crime occurred, prosecutors could wield the grand jury as an intelligence-gathering tool.

Pursuant to the information-sharing guidelines, the CIA Director has a direct role in the disclosure process.³⁵⁷ The guidelines thus foster an unhealthy entanglement between the Justice Department and the CIA. The Director is charged with helping the Attorney General establish any formalized exceptions to the rule of disclosure,³⁵⁸ assisting in the design of a training curriculum which will allow law enforcement officials to identify intelligence information,³⁵⁹ and consulting with the Attorney General on decisions relating to whether to exempt specific materials from disclosure.³⁶⁰ Further, Guideline 6 permits recipients of information to request "additional information," "clarification," or "amplification."³⁶¹ If a prosecutor knows that the CIA wishes to obtain additional facts on a matter unrelated to the grand jury's criminal investigation, directing questions on that matter to a witness would be all too easy.³⁶²

Information sharing between federal law enforcement agencies and intelligence agencies may well be necessary to national security, but such sharing could be fostered without the excessive entanglement created by the Patriot intelligence exception. The decision as to whether or not to disclose grand jury materials could be made by a truly neutral decisionmaker, who could balance the interests of all involved; namely, a judge. The dangers these

³⁵⁵ See Ashcroft Memorandum I, *supra* note 117, Guideline 2, at 2.

³⁵⁶ Jennifer M. Collins, *And the Walls Came Tumbling Down: Sharing Grand Jury Information with the Intelligence Community Under the USA PATRIOT Act*, 39 AM. CRIM. L. REV. 1261, 1276 (2002).

³⁵⁷ With the passage of the Intelligence Reform and Terrorism Prevention Act of 2004, this role will likely be assumed by the Director of National Intelligence. See FED. R. CRIM. P. 6(e)(3)(D)(i) (indicating the guidelines are to be promulgated by the Attorney General and the Director of National Intelligence). As of the writing of this Article, however, the guidelines promulgated by the Attorney General and the Director of the Central Intelligence Agency remain in force.

³⁵⁸ Ashcroft Memorandum I, *supra* note 117, Guideline 2, at 2.

³⁵⁹ *Id.* Guideline 5(c), at 4.

³⁶⁰ *Id.* Guideline 9(b), at 5.

³⁶¹ *Id.* Guideline 6(b), at 4.

³⁶² Collins, *supra* note 356, at 1276. This is especially true since the CIA itself lacks subpoena power. *Id.*; see also 50 U.S.C. 403-3(d)(1) (2000).

entanglements pose to our civil rights are well documented.³⁶³ Even though several justifications for lack of judicial supervision have been put forth,³⁶⁴ by simply requiring judicial supervision, this slippery slope could be avoided altogether.

Members of the Bush Administration provided initial justifications.³⁶⁵ The House Judiciary Committee approved a version of the Patriot intelligence exception that required judicial supervision.³⁶⁶ It would have allowed disclosure:

*when permitted by a court at the request of an attorney for the government, upon a showing that the matters pertain to international or domestic terrorism (as defined in section 2331 of title 18, United States Code) or national security, to any Federal law enforcement, intelligence, national security, national defense, protective, immigration personnel, or to the President or Vice President of the United States, for the performance of official duties.*³⁶⁷

Some senators strongly advocated for judicial supervision. Senator Patrick Leahy, for example, argued that judicial oversight of disclosure of both wiretap information and grand jury materials to intelligence officials was warranted.³⁶⁸ On September 30, 2001, the Administration agreed to judicial oversight, but within two days it reneged.³⁶⁹ According to Senator Leahy,

[t]he Administration offered three reasons for reneging on the original deal. First, they claimed that the involvement of the court would inhibit Federal investigators and attorneys from disclosing information needed by intelligence and national security officials. Second, they said the courts might not have adequate security and therefore should not be told that information was disclosed for intelligence or national security purposes. And third, they said the President's constitutional powers under Article II give him authority to get whatever foreign intelligence he needs to exercise

³⁶³ Collins, *supra* note 356, at 1277 (describing massive abuse of federal law enforcement powers during Cold War).

³⁶⁴ See *infra* notes 365–70 and accompanying text.

³⁶⁵ See 147 CONG. REC. S10,555–56 (daily ed. Oct. 11, 2001) (statement of Sen. Leahy).

³⁶⁶ H.R. REP. NO. 107-236, pt. 1, § 353 (2001).

³⁶⁷ *Id.* (emphasis added).

³⁶⁸ 147 CONG. REC. S10,555–56 (daily ed. Oct. 11, 2001) (statement of Sen. Leahy).

³⁶⁹ *Id.*

his national security responsibilities.³⁷⁰

The first argument, that judicial supervision would somehow inhibit the disclosure of needed information, is specious. If intelligence and national security officials truly “need” information, there is no reason to believe that a federal judge would refuse to authorize its disclosure. To illustrate, the Foreign Intelligence Surveillance Court, which approves electronic surveillance and physical searches for intelligence purposes pursuant to the Foreign Intelligence Surveillance Act of 1978,³⁷¹ has rarely refused a request.³⁷²

³⁷⁰ *Id.* at S10,556. Sen. Leahy provided this explanation when discussing the Administration’s reasons for reneging on its agreement to permit judicial supervision of the disclosure of wiretap information. *Id.* at S10,555–56. Presumably, the Administration went back on its agreement to permit judicial supervision of the disclosure of grand jury information for the same reasons.

³⁷¹ 50 U.S.C. §§ 1802, 1822 (2000).

³⁷² In 1999,

886 applications were made for orders and extensions of orders approving electronic surveillance or physical search under the Act. [T]he United States Foreign Intelligence Surveillance Court issued orders in 880 applications granting authority to the Government for the requested electronic surveillance and electronic searches. . . . Five applications which were filed in late December 1999 were approved when presented to the Court on January 5, 2000. No orders were entered which modified or denied the requested authority.

Letter from Janet Reno, Attorney General, to the Honorable J. Dennis Hastert, Speaker of the House of Representatives (Apr. 27, 2000).

In 2000,

1005 applications were made to the Foreign Intelligence Surveillance Court for electronic surveillance and physical search. The Court approved 1003 of these applications in 2000. Two of the 1005 applications were filed with the Foreign Intelligence Surveillance Court in December 2000 and approved in January 2001. . . . No orders were entered which denied the requested authority.

Letter from John Ashcroft, Attorney General, to L. Ralph Mecham, Director, Administrative Office of the United States Courts (Apr. 27, 2001).

In 2001,

932 applications were made to the Foreign Intelligence Surveillance Court for electronic surveillance and physical search. The Court approved 934 applications in 2001. Two of the 934 applications were filed with the Foreign Intelligence Surveillance Court in December 2000 and approved in January 2001. Two orders and two warrants were modified by the Court. No orders were entered which denied the requested authority.

Letter from Larry D. Thompson, Acting Attorney General, to L. Ralph Mecham, Director, Administrative Office of the United States Courts (Apr. 29, 2002).

“[A]ll 1228 applications presented to the Foreign Intelligen[c]e Surveillance Court in 2002 were approved.” Letter from John Ashcroft, Attorney General, to L. Ralph Mecham, Director, Administrative Office of the United States Courts (Apr. 29,

The executive branch's apparent distrust of the judiciary is alarming.

The Bush Administration may also have been distrustful of the prosecutors themselves, fearing that prosecutors would be unwilling to expend the effort needed to obtain court approval. After taking part in the Congressional Joint Inquiry into Intelligence Community Activities Before and After the Terrorist Attacks of September 11, 2001, a joint inquiry of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, Senator Richard Shelby concluded that the Patriot intelligence exception was enacted because the Justice Department used Rule 6(e) as an excuse to avoid sharing information with the intelligence community.³⁷³ The Justice Department claimed Rule 6(e) protection for non-grand jury materials.³⁷⁴

[W]orking from the assumption that it would be easier to change the law itself than to fix a parochial and dysfunctional institutional culture that used the Rule as an excuse to prevent *all* information-sharing, [Attorney General Ashcroft and Congress] determined simply to *change* Rule 6(e) to permit information-sharing with intelligence officials.³⁷⁵

Indeed, the law now requires law enforcement officials to share information.³⁷⁶ The fact that prosecutors may have misapplied Rule 6(e) protections in the past does not justify a wholesale change in the rule or, more to the point, elimination of judicial oversight. If the institutional culture within the Justice Department is dysfunctional, it must be changed from within.

2003).

³⁷³ ADDITIONAL VIEWS OF SEN. RICHARD C. SHELBY, VICE-CHAIRMAN, SEN. SELECT COMM. ON INTELLIGENCE, SEPTEMBER 11 AND THE IMPERATIVE OF REFORM IN THE U.S. INTELLIGENCE COMMUNITY 58, S. REP. NO. 107-351 (2002).

Rule 6(e) increasingly came to be used simply as an excuse for *not* sharing information—leaving vital collections of *shareable* information about international terrorist groups off-limits to IC intelligence analysts. For years, it was routine FBI and DOJ practice to respond to virtually *any* Intelligence Community requests for information with the answer that “Rule 6(e)” prevented any response. As two frustrated NSC veterans describe it, “Rule 6E [sic] is much more than a procedural matter: it is the bulwark of an institutional culture, and as Justice Department lawyers readily admit, it is used by the Bureau far more often than it should be. It is one of the Bureau’s foremost tools for maintaining the independence that the FBI views as its birthright.”

Id. (footnote omitted).

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 59.

³⁷⁶ *Id.*

The second argument (that the courts lack adequate security to be entrusted with sensitive information) is equally unsound. First, the courts certainly have the benefit of as much security as many of the federal agencies and departments that will be the recipients of information disclosed under the Patriot intelligence exception. A federal court poses no greater security risk than does the Social Security Administration. Second, the problem of security could easily be overcome by creating a court akin to the Foreign Intelligence Surveillance Court established under the Foreign Intelligence Surveillance Act of 1978 (FISA).³⁷⁷ For example, the chief judge for each district could appoint a judge to hear all requests under the Patriot intelligence exception. That judge could receive special training and employ heightened security measures. Appeals could be made to a specialized court of review appointed by the Chief Justice.

Finally, the third argument (that the President could employ powers under Article II to compel disclosure) begs the question of whether he should do so. That the President has an absolute right to go through grand jury materials is doubtful at best—no president has ever exercised such a power. Even assuming this power exists, exercising it in the indiscriminate manner permitted, and even mandated, under the Patriot intelligence exception would be foolhardy. “In fact the whole theory of [the grand jury’s] function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.”³⁷⁸ The President should and must trust that the courts will recognize his needs.³⁷⁹

The Justice Department hinted at another justification in its response to questions from the House of Representatives’ Committee on the Judiciary. In explaining how the Patriot intelligence exception aids in the information-sharing process, the Justice Department noted the “practical difficulties” involved in utilizing the traditional exceptions.³⁸⁰ For example, in discussing the problems involved with using the law enforcement exception, the Justice

³⁷⁷ See generally 50 U.S.C. § 1803 (2000 & Supp. I 2001). The Foreign Intelligence Surveillance Court consists of eleven district court judges selected by the Chief Justice. *Id.* § 1803(a). The court is conducted in secret in Washington, D.C., with the judges presiding on a rotating basis. Jeremy D. Mayer, *9-11 and the Secret FISA Court: from Watchdog to Lapdog?*, 34 CASE W. RES. J. INT’L L. 249, 250, 252 (2002).

³⁷⁸ *United States v. Williams*, 504 U.S. 36, 47 (1992).

³⁷⁹ 147 CONG. REC. S10,556 (daily ed. Oct. 11, 2001) (statement of Sen. Leahy).

³⁸⁰ See Bryant Letter (Sept. 20, 2002), *supra* note 137, at 1.

Department pointed out that the exception requires a government attorney to provide the court with the name of each individual receiving information under the exception.³⁸¹ “In the context of the 9/11 investigations and other terrorism investigations that are national and international in scope and may involve literally thousands of investigators and dozens of grand juries, this requirement was onerous and a diversion of resources from investigative activity.”³⁸² If the Justice Department views merely reporting information to a court as “onerous,” it likely views obtaining approval for disclosure as extraordinarily burdensome. Undeniably, permitting disclosure without court approval is more cost-effective. The Supreme Court, however, has never viewed cost savings as a valid reason for lifting the veil of grand jury secrecy.³⁸³ If the Justice Department requires additional clerical or other help, the American taxpayers should be forced to bear that cost.

Any “practical difficulties” resulting from the time required to obtain court approval could easily be addressed in the text of the rule. The Attorney General’s information-sharing guidelines already distinguish between the treatment of materials relating to “a potential terrorism³⁸⁴ or Weapons of Mass Destruction³⁸⁵ threat” and the treatment of other grand jury materials subject to disclosure under the Patriot intelligence exception by permitting a forty-eight hour

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 431 (1983) (concluding that while it would be “of substantial help to a Justice Department Civil attorney if he had free access to a storehouse of evidence compiled by a grand jury[,]” this type of cost savings could not justify a breach of grand jury secrecy).

³⁸⁴ “Terrorism Information” is defined as:

All information relating to the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of foreign or international terrorist groups or individuals or threats posed by such groups or individuals to the United States, United States persons, or United States interests, or to those of other nations, or to communications between such groups or individuals, or information relating to groups or individuals reasonably believed to be assisting or associated with them.

Ashcroft Memorandum I, *supra* note 117, Guideline 5(a) (i), at 3.

³⁸⁵ “Weapons of Mass Destruction (WMD) Information” is defined as “All information relating to conventional explosive weapons and non-conventional weapons capable of causing mass casualties and damage, including chemical, biological, radiological and nuclear agents and weapons and the means of delivery of such weapons.” *Id.* Guideline 5(a) (ii).

delay in the disclosure of the latter.³⁸⁶ When an immediate threat exists to national security, prosecutors could be permitted to disclose without judicial approval. In contrast, when time is not of the essence, a fast-track judicial approval procedure is more appropriate. Accordingly, no valid justification exists for the absence of judicial supervision. Congress could easily amend Rule 6(e) to protect important national security interests without destroying the secrecy that is so essential to grand jury proceedings.

B. The Terrorism Prevention Exception

The terrorism prevention exception raises the same constitutional issues as the Patriot intelligence exception. As written, the terrorism prevention exception would violate the Grand Jury Clause of the Fifth Amendment.³⁸⁷ Again, even if the constitutional issues are ignored, sound public policy reasons exist for redrafting this exception.³⁸⁸

1. The Fifth Amendment Analysis

To satisfy Fifth Amendment requirements, any disclosure of grand jury materials must be justified by a compelling necessity and be judicially supervised.³⁸⁹ The terrorism prevention exception authorizes disclosures that satisfy neither criterion. This exception permits disclosure without judicial approval of

any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.³⁹⁰

Under the two-pronged compelling necessity test, the disclosure sought must be of a kind that serves an important societal interest,³⁹¹ and the need for disclosure must be shown with particularity.³⁹²

³⁸⁶ See *supra* notes 131–35 and accompanying text.

³⁸⁷ See *infra* Part III.B.1.

³⁸⁸ See *infra* Part III.B.2.

³⁸⁹ See *supra* Part II.E.

³⁹⁰ FED. R. CRIM. P. 6(e)(3)(D).

³⁹¹ See *supra* notes 273–79 and accompanying text.

³⁹² See *supra* notes 280–96 and accompanying text.

Undoubtedly, the terrorism prevention exception satisfies the first prong of this test. This exception is more narrowly drawn than the Patriot intelligence exception in one important respect—the Patriot intelligence exception permits the disclosure of information that does not relate to a direct threat of some type to the United States.³⁹³ As discussed above,³⁹⁴ “foreign intelligence” could involve virtually any act by a noncitizen. In contrast, the terrorism prevention exception for the most part focuses on activities, such as attack, sabotage, and terrorism, that involve a direct threat to public safety.³⁹⁵ Preventing such activities unquestionably serves a long-recognized societal interest.³⁹⁶

However, the terrorism prevention exception fails to satisfy the second prong of the test, for it permits disclosure without a showing of particularized need. Not every situation encompassed within the exception’s broad terms involves a real threat to public safety. For instance, many actions could be disclosed under the undefined threat of “terrorism.”³⁹⁷ Naturally, the county sheriff needs to know that there are plans afoot to place a bomb in the county courthouse. On the other hand, the county sheriff may not need to know that there are plans afoot for a peaceful protest within the courthouse. This exception could easily become a tool used against those who might voice public dissent.

Moreover, the exception permits disclosure to a wide range of officials, from the President of the United States to the mayor of a village in the middle of Tibet.³⁹⁸ The vital question of which officials possess a genuine need to know about a particular “threat” is far from clear. As written, the terrorism prevention exception permits disclosure when no compelling need exists.

Since the exception only became effective in December 2004 it is difficult to predict how it will be applied.³⁹⁹ Rule 6(e)(3)(D)(i)

³⁹³ See *supra* text accompanying notes 97–103.

³⁹⁴ See *supra* notes 100 & 334–35 and accompanying text.

³⁹⁵ See *supra* note 177 and accompanying text.

³⁹⁶ Indeed, there have been rare occasions in our history when the Supreme Court was willing to sacrifice fundamental individual liberties on the altar of national security. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (upholding wartime exclusion order by commanding general of Western Command, U.S. Army, “which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from [San Leandro, California, a military area]”).

³⁹⁷ See *supra* text accompanying notes 181–84.

³⁹⁸ See *supra* notes 185–88 and accompanying text.

³⁹⁹ The Guidelines Regarding Disclosure to the Director of Central Intelligence

indicates that the Attorney General and the Director of National Intelligence will jointly issue guidelines governing the *use* of grand jury materials by state, foreign, and local officials pursuant to the Patriot intelligence and terrorism prevention exceptions. This part of the rule, nevertheless, does not require the issuance of any guidelines governing the disclosure of such information. Still, there is no reason to believe that the Attorney General will not follow the precedent set in the interpretation of the Patriot intelligence exception by making disclosure mandatory.

The terrorism prevention exception also fails to satisfy the criterion that any disclosure be judicially supervised.⁴⁰⁰ The language of the exception permits prosecutors to act unilaterally. If a substantial threat is imminent, the government's interest in protecting national security may outweigh any right to grand jury secrecy. In that case, unilateral action may be constitutionally permissible. The language of the exception, however, permits unilateral action even in the absence of an imminent threat. Despite a lack of purpose, the exception excludes judicial participation in the decision-making process. As with the Patriot intelligence exception, the court is provided with nothing more than a vague, after-the-fact notice that "information" was disclosed to a particular department, agency, or entity.⁴⁰¹ No meaningful role exists for the judiciary in this process.⁴⁰²

The establishment of the terrorism prevention exception sets the stage for a material breach of the protection afforded grand jury secrecy by the Fifth Amendment. Congress' failure to require a showing of particularized need and to provide a meaningful role for the courts means that vast numbers of disclosures can and will be made. Again, the cumulative effect of these disclosures will be to chill the participation of grand jury witnesses, and thereby cause systemic injury to the grand jury process.⁴⁰³

and Homeland Security Officials of Foreign Intelligence Acquired in the Course of a Criminal Investigation released by Attorney General Ashcroft on Sept. 23, 2002, apply to information sharing under section 905(a) of the USA PATRIOT Act. Ashcroft Memorandum I, *supra* note 117, at 1. Thus, under the terrorism prevention exception, these Guidelines do not apply to disclosures.

⁴⁰⁰ See *supra* Part II.E.2.

⁴⁰¹ See FED. R. CRIM. P. 6(e)(3)(D)(ii); *supra* note 200 and accompanying text.

⁴⁰² See *supra* text accompanying notes 199–202.

⁴⁰³ See generally *supra* notes 236–47 and accompanying text.

2. The Public Policy Analysis

Even assuming that the terrorism prevention exception poses no constitutional problems, strong public policy arguments support its amendment. In creating this exception, Congress took measures far beyond those necessary to achieve the legitimate goal of preventing and responding to threats to our national security. Unnecessarily, Congress sacrificed the “public interest” in secrecy.⁴⁰⁴ Judicious amendment of the terrorism prevention exception could protect the doctrine of grand jury secrecy while furthering the goal of preventing and responding to national security threats.

Few would disagree with Congress that, in some form, a terrorism prevention exception should exist—if information regarding a true threat to national security becomes known during a grand jury session, it should be disclosed to the proper authorities. Grand jury materials have been disclosed for lesser reasons.⁴⁰⁵ But in drafting the terrorism prevention exception, Congress made some critical mistakes. First, it failed to set needed parameters in terms of the types of information that could be disclosed under the exception. Failing to define terms such as “terrorism”⁴⁰⁶ denies those seeking to apply the exception much-needed guidance and opens the doors to abuse. It allows the disclosure of activities that do not pose any threat to national security.

Second, Congress again created a system that places no checks on the executive branch’s power. The judiciary lacks the ability to identify, much less prevent or punish any abuses of this exception. Further, “[s]ince the Department of Justice has taken the position that the intelligence committees of Congress should not be permitted to see any grand jury information, this means that there is *no* oversight of what use is made of grand jury material passed to the Intelligence Community.”⁴⁰⁷ Ironically, the same information that is

⁴⁰⁴ *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 218–23 (1979); see also *supra* notes 9–28 and accompanying text, 39–46 and accompanying text, and Part II.C.

⁴⁰⁵ For instance, where a particularized need is established, grand jury materials may be disclosed for use in other civil and criminal proceedings. FED. R. CRIM. P. 6(e)(3)(E)(i).

⁴⁰⁶ See *supra* notes 182–84, 397 and accompanying text.

⁴⁰⁷ SHELBY, S. REP. 107-351, *supra* note 373, at 60 n.123. “The Senate Select Committee on Intelligence tried to provide for such oversight in its FY03 authorization bill, see S.2506 (107th Cong., 2d Sess.), at § 306, but this provision was removed in conference at the insistence of the Administration.” *Id.*

entrusted to a foreign official may not be shared with the judicial or legislative branches of our own government.

Certainly, some situations exist in which it would be impracticable to require prosecutors to seek judicial approval. Of course, if a substantial and imminent threat exists a prosecutor may need to shout what he knows from the rooftops. The law, naturally, should permit such disclosures. But not every situation requires immediate disclosure. Indeed, some situations do not require any disclosure. At a minimum, prosecutors should be required to provide a list of those receiving information to the court.⁴⁰⁸

Prosecutors and judges can and should work hand-in-hand to determine when the public's interest in national security outweighs its interest in grand jury secrecy. The prosecutor should identify information that may evidence a threat and immediately bring that information to the court's attention. The court should quickly weigh all of the competing interests and determine whether disclosure is warranted and the conditions under which it should be made. Weighing the interests involved benefits all concerned. Grand jury targets are not the only parties who have a strong interest in a grand jury system that protects against unwarranted disclosures.⁴⁰⁹ Both the public and the government have an interest in maintaining a system in which grand jury witnesses freely step forward and testify "fully and frankly," and in which targets are not given the opportunity to flee or intimidate witnesses or jurors.⁴¹⁰ Secrecy is necessary to the discovery of the truth.

While the Bush Administration has fought hard to create the new exceptions to the rule of secrecy, it too apparently recognizes the value of secrecy. In early 2003, the Administration reportedly floated legislation that would amend Rule 6(e) yet again to tighten the rule of secrecy.⁴¹¹ Section 206 of the Domestic Security Enhancement Act of 2003 would have, in certain circumstances, required secrecy with respect to grand jury witnesses.⁴¹² Although, for the time being, this

⁴⁰⁸ See *supra* notes 381–83 and accompanying text.

⁴⁰⁹ See *supra* notes 236–47 and accompanying text; *Douglas Oil Co.*, 441 U.S. at 218 (finding that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings").

⁴¹⁰ *Douglas Oil Co.*, 441 U.S. at 219.

⁴¹¹ Domestic Security Enhancement Act of 2003, "PATRIOT ACT II", at <http://www.ratical.org/ratville/CAH/PA2draft.html#Sec206summ> (draft Jan. 9, 2003).

⁴¹² *Id.* Specifically, the description of section 206, entitled "Grand Jury Information in Terrorism Cases" states:

proposal now appears to have been dropped,⁴¹³ it evidences the vital role of secrecy in the grand jury system.

Another person with a substantial interest in maintaining grand jury secrecy is the grand jury witness. Under the terrorism prevention exception as written, no one protects the interests of the witness. No one is charged with considering whether disclosing a witness' testimony might place that witness, or a relative in a different country, in danger. The danger of intimidation, injury, or even death should not be taken lightly—grand jury tampering does occur.⁴¹⁴ Judicial supervision of any proposed disclosure is necessary to protect grand jury witnesses from harm.

Judicial supervision may even further the goal of obtaining helpful intelligence information from grand jury witnesses. If the public begins to perceive grand juries as the tool of the intelligence community, revealing anything and everything, witnesses may withhold important information out of fear. Limiting disclosures to materials involving truly vital information may actually help in the acquisition of such information. It is indisputable that it might be more convenient for the Justice Department to act unilaterally in making the decision to disclose, but “‘doubtless all arbitrary powers, well executed, are the most *convenient*.’”⁴¹⁵ “[Y]et let it be again remembered that delays and little inconveniences in the forms of

This section amends Rule 6(e)(2)(B) of the Federal Rules of Criminal Procedure to make witnesses and persons to whom subpoenas are directed subject to grand jury secrecy rules in cases where serious adverse consequences may otherwise result, including danger to the national security or to the life or physical safety of an individual, flight from prosecution, destruction of or tampering with evidence, intimidation of a potential witness, or other serious jeopardy to an investigation. The provision would permit witnesses and recipients of grand jury subpoenas to consult with counsel regarding the subpoena and any testimony, but would impose the same secrecy obligations on counsel.

Id.

⁴¹³ See Bob Egelko, *Bush, Kerry Divided on Scope of Patriot Act; President Says Expand, Rival Says Reduce*, S.F. CHRON., Sep. 20, 2004, at A1.

⁴¹⁴ In the late 1970's the General Accounting Office (GAO) documented “343 [grand jury] witnesses who had their identities revealed before any indictments were returned by grand juries, including 5 who were murdered, 10 who were intimidated, and 1 who disappeared.” GAO REP. TO CONG.: MORE GUIDANCE AND SUPERVISION NEEDED OVER FEDERAL GRAND JURY PROCEEDINGS 6 (1980). Since the GAO studied only a few of the federal districts, these numbers represent only “the tip of the iceberg.” *Id.* (internal quotation marks omitted).

⁴¹⁵ *Hurtado v. California*, 110 U.S. 516, 545 (1884) (Harlan, J., dissenting) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 350).

justice are the price that all free nations must pay for their liberty in more substantial matters.’”⁴¹⁶ Based on the foregoing, Congress was correct in reviving the terrorism prevention exception, but erred in failing to protect the secrecy that is essential to grand jury proceedings.

⁴¹⁶ *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 349, 350).

IV. A PROPOSED AMENDMENT TO RULE 6(E)⁴¹⁷

⁴¹⁷ As of January 18, 2005, Rule 6(e) (2), (3) read:
(e) Recording and Disclosing the Proceedings.

....

(2) *Secrecy.*

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e) (2) (B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- (i) a grand juror;
- (ii) an interpreter;
- (iii) a court reporter;
- (iv) an operator of a recording device;
- (v) a person who transcribes recorded testimony;
- (vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e) (3) (A) (ii) or (iii);

(3) *Exceptions.*

(A) Disclosure of a grand-jury matter—other than the grand jury's deliberations or any grand juror's vote—may be made to:

- (i) an attorney for the government for use in performing that attorney's duty;
- (ii) any government personnel—including those of a state, state subdivision, Indian tribe, or foreign government—that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or
- (iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e) (3) (A) (ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e) (3) (D) (iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate Federal, State, State subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or

activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any State, State subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only consistent with such guidelines as the Attorney General and the Director of National Intelligence shall jointly issue.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

actual or potential attack or other grave hostile acts of a foreign power or its agent;

sabotage or international terrorism by a foreign power or its agent; or clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

the national defense or the security of the United States; or the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state-subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is *ex parte*—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and

To address the concerns outlined above, I propose that Congress amend Rule 6(e)(2), (3) to read:⁴¹⁸

(e) Recording and Disclosing the Proceedings.

....

(2) *Secrecy*.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- (i) a grand juror;
- (ii) an interpreter;
- (iii) a court reporter;

be heard to:

- (i) an attorney for the government;
- (ii) the parties to the judicial proceeding; and
- (iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) *Sealed Indictment*. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) *Closed Hearing*. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) *Sealed Records*. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) *Contempt*. A knowing violation of Rule 6, or of guidelines jointly issued by the Attorney General and the Director of National Intelligence pursuant to Rule 6, may be punished as a contempt of court.

⁴¹⁸ The substantive changes are underlined.

- (iv) an operator of a recording device;
- (v) a person who transcribes recorded testimony;
- (vi) an attorney for the government; or
- (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii);

(3) *Exceptions.*

(A) Disclosure of a grand jury matter—other than the grand jury’s deliberations or any grand juror’s vote—may be made to:

- (i) an attorney for the government for use in performing that attorney’s duty;
- (ii) any government personnel—including those of a state or state subdivision or of an Indian tribe—that an attorney for the government considers necessary to assist in performing that attorney’s duty to enforce federal criminal law; or
- (iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney’s duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand jury matter when the matter involves information that he or she reasonably believes may evidence an imminent, substantial threat to the United States homeland, its critical infrastructure, its key resources (whether physical or electronic), or its persons or interests worldwide, to any appropriate federal, state, local, or foreign government official for the purpose of preventing or responding to such a threat.

(i) Any official who receives information under Rule 6(e)(3)(D) may use that information only as necessary in the conduct of that person’s official duties subject to any limitations on the unauthorized disclosure of such information.

(ii) Any state, local, or foreign official who receives information pursuant to Rule 6(e)(3)(D) shall use that

information only consistent with such guidelines as the Attorney General and Director of National Intelligence shall jointly issue.

(iii) After a disclosure made pursuant to Rule 6(e)(3)(D), an attorney for the government must promptly provide the court with a notice containing the names of all persons to whom a disclosure has been made, a brief description of the information disclosed and the reason for the disclosure, and a certification that the attorney has advised such persons of any obligation of secrecy under this rule or any applicable guidelines. This notice shall be filed under seal.

(E) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter preliminarily to or in connection with a judicial proceeding.

(F) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.

(G) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—at the request of the government if it shows that the matter may disclose a violation of state or Indian tribal criminal law, as long as the disclosure is to an appropriate state, state-subdivision, or Indian tribal official for the purpose of enforcing that law.

(H) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(I) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—at the request of the government if it shows that the matter involves information that may evidence a substantial threat to the United States homeland, its critical infrastructure, its key resources (whether physical or electronic), or its persons or interests worldwide, or it shows that such matters involve clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by an agent of a foreign power, within the United States or elsewhere, to any appropriate federal, state, local, or foreign government official for the purpose of

preventing or responding to such a threat or such activities.

(i) Any official who receives information under Rule 6(e)(3)(I) may use that information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(ii) In addition to any conditions imposed by the court, any state, local, or foreign official who receives information pursuant to Rule 6(e)(3)(I) may use that information only consistent with such guidelines as the Attorney General and Director of National Intelligence shall jointly issue.

(J) The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—at the request of the government if it shows that such matters involve significant foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401a), or foreign intelligence information (as defined in Rule 6(e)(3)(J)(ii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties.

(i) Any federal official who receives information under Rule 6(e)(3)(J) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information.

(ii) As used in Rule 6(e)(3)(J), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against—

• actual or potential attack or other grave hostile acts of a foreign power or its agent;

• sabotage or international terrorism by a foreign power or its agent; or

• clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to—

• the national defense or the security of the United States; or

• the conduct of the foreign affairs of the United States.

(K) A petition to disclose a grand jury matter under Rule 6(e)(3)(E) must be filed in the district where the grand jury convened. Unless the hearing is ex parte—as it may be when the government is the petitioner—the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

- (i) an attorney for the government;
- (ii) the parties to the judicial proceeding; and
- (iii) any other person whom the court may designate.

(L) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(K) a reasonable opportunity to appear and be heard.

(M) In Rule 6(e)(3)(D) and Rule 6(e)(3)(I),

(i) the term “substantial threat” means a threat of actual or potential attack or other grave hostile acts by a foreign power or an agent of a foreign power, sabotage (as defined in 18 U.S.C. §§ 2152–2156), domestic or international terrorism (as defined in 18 U.S.C. § 2331), or use of weapons of mass destruction;

(ii) the term “information” as it relates to “a threat of actual or potential attack or other grave hostile acts by a foreign power or an agent of a foreign power” means all information relating to the existence, organization, capabilities, communications, plans, intentions, vulnerabilities, means of finance or material support, or activities of a foreign power or an agent of a foreign power relating to such threat, or to the same information relating to groups or individuals reasonably believed to be assisting or associated with them;

(iii) the term “information” as it relates to a threat of “sabotage” means all information relating to the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of saboteurs or threats posed by such groups or individuals to the United States, its persons, or its interests or those of other associate nations (as defined in 18 U.S.C. § 2151), or to communications between such groups or individuals, or to the same information relating to groups or individuals reasonably believed to be assisting or

associated with them;

(iv) the term “information” as it relates to a threat of “domestic or international terrorism” means all information relating to the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of foreign, international, or domestic terrorist groups or individuals, or threats posed by such groups or individuals to the United States, United States persons, or United States interests, or those of other nations, or to communications between such groups or individuals, or to the same information relating to groups or individuals reasonably believed to be assisting or associated with them;

(v) the term “information” as it relates to a threat of “use of weapons of mass destruction” means all information relating to conventional explosive weapons and non-conventional weapons capable of causing mass casualties and damage, including chemical, biological, radiological, and nuclear agents and weapons and the means of delivery of such weapons.

(N) A petition for disclosure pursuant to Rule 6(e)(3)(I) or Rule 6(e)(3)(J) shall be ruled upon by the judge designated in subparagraph (O)(i) within forty-eight (48) hours of its filing. Any review of a denial of such a petition shall be conducted as expeditiously as possible.

(O) A notice of disclosure pursuant to Rule 6(e)(3)(D) or a petition for disclosure pursuant to Rule 6(e)(3)(I) or Rule 6(e)(3)(J) shall be filed in the district where the grand jury convened.

(i) The Chief Judge for each district shall designate one judge serving within the district and one alternate to review such notices and hear such petitions for a term of three years. If a petition is denied, the court shall immediately provide for the record a written statement of each reason for its decision. On motion of the United States, the record shall be transmitted, under seal, to the court of review established in Rule 6(e)(3)(O)(ii).

(ii) The Chief Justice of the United States Supreme Court shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from each United States Court of Appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any petition within its Circuit under these subdivisions. If a court of review determines that the application was properly denied, the court shall immediately provide for the record a written statement

of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(iii) The record of proceedings under Rule 6(e)(3)(O) including notices filed, petitions made, and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence.

This amendment would preserve the best features of the Patriot intelligence exception, the terrorism prevention exception, and the information-sharing guidelines issued by the Attorney General. It recognizes the need and right of prosecutors to share grand jury materials relating to substantial threats to the United States and its people. The pre-September 11th version of Rule 6(e) was lacking in that it failed to provide for situations in which the need for secrecy is outweighed by a need to protect against terrorism and other hostile acts.⁴¹⁹ Congress did not err in seeking to rectify this flaw. Congress did err in completely excluding the courts from the decision-making process and ignoring society's interest in grand jury secrecy. Proposed Rule 6(e)(3)(D) allows prosecutors to act unilaterally when an *imminent*, substantial threat exists. The definitions in Rule 6(e)(3)(M) should help prosecutors identify the types of situations in which this power should be invoked. Conversely, the reporting requirement in proposed Rule 6(e)(3)(D)(iii) should guard against prosecutorial abuse.

When no imminent threat exists, the proposed amendment affords courts the opportunity to undertake the traditional, constitutional balancing analysis to determine whether a particularized need for disclosure exists and whether that need outweighs society's interest in maintaining grand jury secrecy.⁴²⁰ Proposed Rule 6(e)(3)(I) permits judicially-approved disclosure of substantial threats to the nation's security,⁴²¹ and proposed Rule 6(e)(3)(J) permits judicially-approved disclosure of significant

⁴¹⁹ The omission of an exception for the disclosure of intelligence information is understandable. Warfare has changed dramatically. Until recently, it was unimaginable that the United States would face terrorist attacks on the home front.

⁴²⁰ See *supra* Part II.E.

⁴²¹ Proposed Rules 6(e)(3)(D) and 6(e)(3)(I) replace the terrorism prevention exception.

intelligence information.⁴²²

Rule 6(e)(3)(O) provides for the appointment of a special judge within each district and a special panel within each circuit to handle notices and petitions filed pursuant to the new exceptions. Not only does the appointment of this special court permit heightened security, it also creates a corps of judges with special expertise in this area.⁴²³ To facilitate an expedited response, Rule 6(e)(3)(N) requires a decision within forty-eight hours of the filing of a petition. In short, the proposed amendment would protect national security interests without destroying the secrecy so crucial to grand jury functioning.

V. CONCLUSION

In creating the Patriot intelligence exception and the terrorism prevention exception, Congress acted with the honorable intention of avoiding further terrorist atrocities on American soil. But in the words of Justice Brandeis:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁴²⁴

In its zeal to bolster our national security, Congress passed laws that endanger our liberty. Both the Patriot intelligence exception and the terrorism prevention exception violate the Grand Jury Clause of the Fifth Amendment.⁴²⁵ Constitutional questions aside, public policy concerns caution against needlessly destroying grand jury secrecy.⁴²⁶ By itself, doing away with grand jury secrecy would probably not bring the Republic to its knees. But the destruction of this right must not be viewed in isolation. With one stroke of the presidential pen, Americans arguably lost a right older than the nation itself. In times of national crisis, we must be even more vigilant in protecting the basic rights on which our nation was built. By revisiting Rule 6(e), Congress can draft a rule that strengthens national security while preserving the grand jury system. The goals of liberty and security

⁴²² Proposed Rule 6(e)(3)(J) replaces the Patriot intelligence exception.

⁴²³ Such judges should be provided with specialized training.

⁴²⁴ *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

⁴²⁵ See *supra* Part III.A.1 & Part III.B.1.

⁴²⁶ See *supra* Part III.A.2 & Part III.B.2.

should not be viewed as mutually exclusive.